

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:

FAIRLAND ANIMAL HOSPITAL, INC.

Petitioner

Dr. Jeffrey Whall, DVM

Maggie Whall

Patrick La Vay

Eric Doering

Charles Bailey

Craig Hedberg

For the Petition

Jody S. Kline, Esquire

Attorney for the Petitioner

Marylee Davids, Trustee of Blaney B.

Marlow Trust (Current Site Owner)

In Support of the Petition

Before: Martin L. Grossman, Hearing Examiner

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Board of Appeals No. S-2820

OZAH Case No. 12-9

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

In Petition No. S-2820, Fairland Animal Hospital, Inc. seeks approval of a Special Exception under Zoning Ordinance §59-G-2.32 to allow construction and operation of a veterinary hospital, which has been operating at a different location for a number of years. The subject property is located at 13425 Old Columbia Pike, Silver Spring, Maryland, in the R-90 Zone. It is currently owned by the Blaney B. Marlow Trust, and Petitioner has filed a letter of intent to purchase the site. Exhibit 9. This special exception petition was originally joined with a Variance application, but that has been withdrawn.¹ Exhibit 41.

On September 12, 2011, the Board issued a notice of a public hearing before the Hearing Examiner on December 16, 2011 (Exhibit 16). A report issued by Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), dated November 30, 2011 (Exhibit 20), recommended approval of the Petition, with conditions.² The Montgomery County Planning Board reviewed the matter on December 8, 2011, and voted unanimously to recommend approval, with modified conditions (Exhibit 28, Letter of December 12, 2011).

The hearing went forward as scheduled on December 16, 2011. Petitioner called six witnesses, and there was no opposition. Marylee Davids, Trustee of the Blaney B. Marlow Trust, the owner of the site, testified in support of the application. The record was held open until January 13, 2012, for the filing of revised plans, an acoustical study and other documents by Petitioner, and any commentary by Technical Staff and interested parties.

¹ The variance had been requested because the codified language of Zoning Ordinance §59-G-2.32(b)(1) sets a maximum lot size of one half acre for veterinary hospitals in the R-90 zone. The subject property contains 1.42 acres. Research on the legislative history of Zoning Ordinance §59-G-2.32(b)(1) revealed that the word “maximum” was not in Ord. No. 14-47, which amended the Zoning Ordinance; rather, Ord. No. 14-47 set a “minimum” lot area of one half acre. The word “maximum” was apparently substituted in error at the codification stage. Since under Montgomery County Code Sec. 1-103, the Ordinance itself controls over the codification, the relevant portion of Ord. No. 14-47 has been added to the record as Exhibit 25(a), and the Hearing Examiner announced at the hearing that he would be applying the “minimum” language from Ord. No. 14-47 in the pending case. Tr. 7. Petitioner’s counsel indicated he would withdraw the variance application (Tr. 8), which he subsequently did. Exhibit 41.

² The Technical Staff Report, Exhibit 20, is frequently quoted and paraphrased herein.

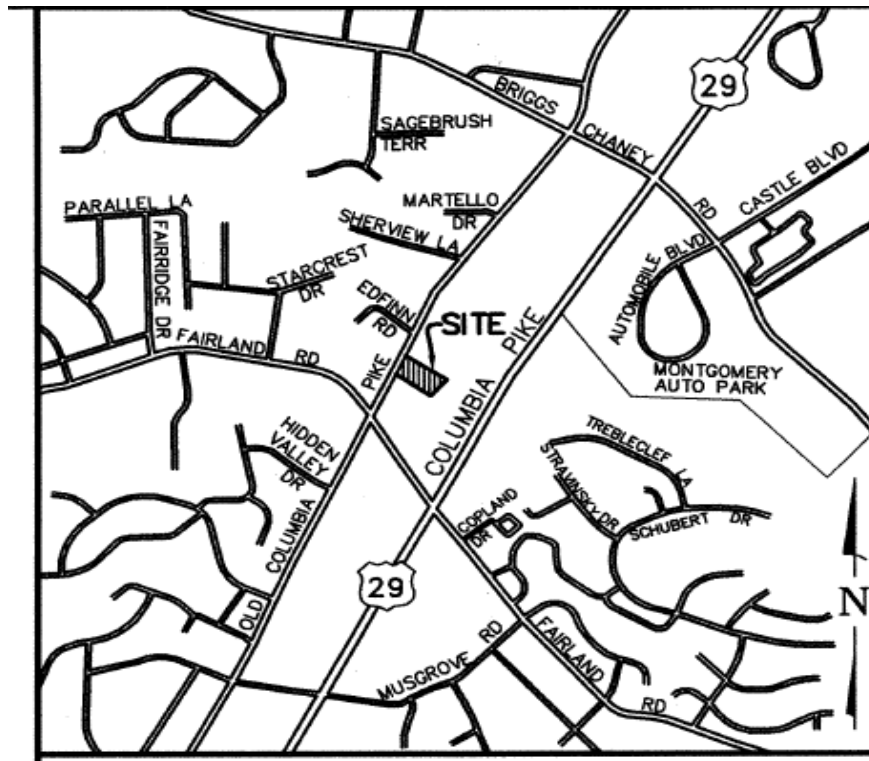
Petitioner made the required filings (Exhibits 41 to 44, and their attachments) on or before December 22, 2011. No further commentary was received from Technical Staff or any interested party, and the record closed, as scheduled, on January 13, 2012.

For the reasons set forth below, the Hearing Examiner recommends approval of the Special Exception petition, and the original site plan (Exhibit 4(a)), which has no exterior dog run on the site.³

II. FACTUAL BACKGROUND

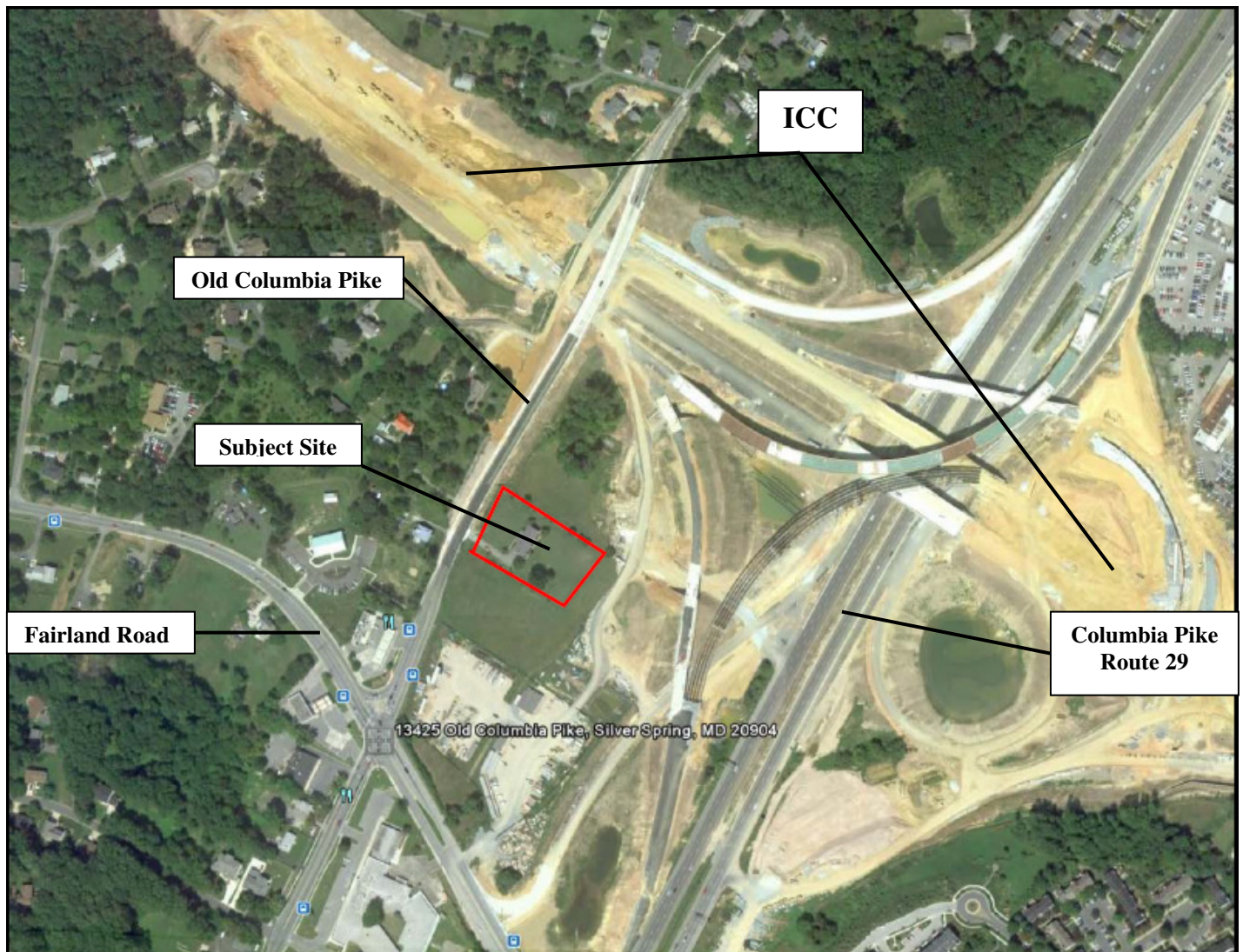
A. The Subject Property and its Current Use

The subject property is located on the east side of Old Columbia Pike in Silver Spring, Maryland, about 600 feet north of Fairland Road. It contains a total of 1.42 acres, and is in the R-90 Zone. Its location is depicted below in a vicinity map from the Site Plan (Exhibit 4(a)):



³ The Planning Board found that such an outdoor dog run would not create an adverse impact on surrounding properties (Exhibit 28, p. 2), but expressed concern as to whether it would be in compliance with the language of Zoning Ordinance §59- G-2.32(b)(2), which provides that exterior areas used to exercise, walk, or keep animals must be set back from any property line 200 feet and screened from adjacent residential properties. This issue will be discussed in Part II. C. 3. of this report.

Since the vicinity map above does not show the Inter-County Connector (ICC) and the connecting ramp systems, a much better sense of the site and its immediate surroundings comes from an aerial photo provided by Petitioner (Exhibit 31):



Technical Staff describes the site as follows (Exhibit 20, pp. 2-3):

The subject property is a rectangular shaped parcel of land comprised of one parcel and contains 1.42 acres. The legal description is Parcel 918 in the Deer Park Subdivision. . . . The property has approximately 195 feet of frontage on Old Columbia Pike. The property is presently improved with a single-family detached dwelling located in the front portion of the site, which is proposed to remain. The existing dwelling will continue as a residence use for one of the staff members of

Fairland Animal Hospital to reside in the house and help maintain the property. The site is generally flat, however, it slopes gently downward on the rear portion of the property, behind the existing residence. The site contains many oak and evergreen trees. These trees are generally mature and are located along the northern and southern boundaries. The existing driveway will be widened and extended to the rear of the property leading to 19 total parking spaces for clients and employees.

According to Staff, there are no existing streams, wetlands, 100-year floodplains, steep slopes, highly erodible soils or environmental buffers on the site, nor is it located within a Special Protection Area (SPA) or a Primary Management Area (PMA). Exhibit 20, p. 4.

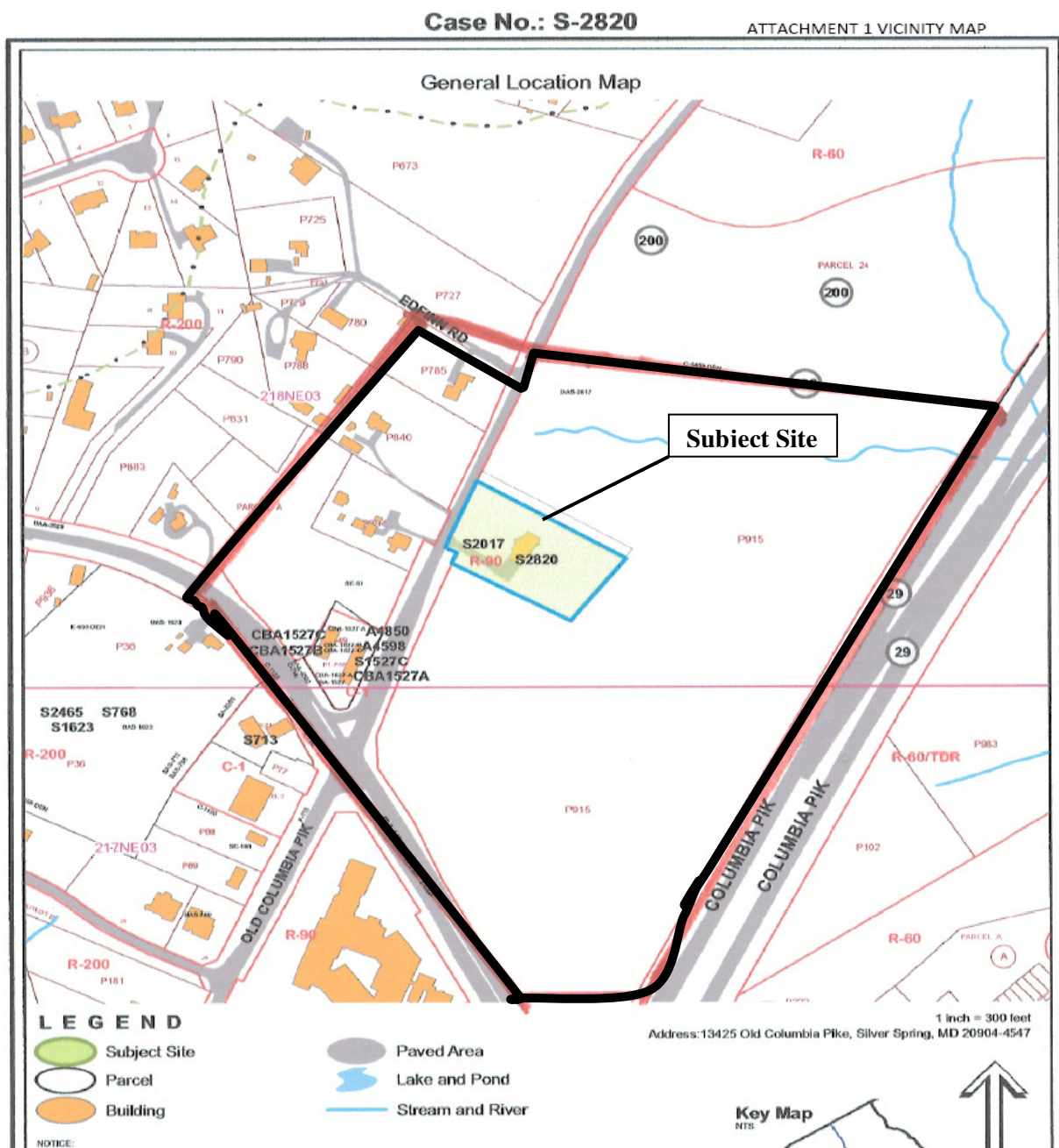
Petitioner's civil engineer, Patrick La Vay, noted that there is an existing asphalt driveway, approximately 18 feet in width and a parking pad associated with an existing house, a brick one-story structure. At the front of the existing house, which is the western portion of the property, there are gentle slopes of two to three percent. As you move to the east behind the existing house, the slopes increase to approximately five percent. There is a drainage divide that runs diagonally across the property from west to east, and all drainage does eventually end up in the Route 29 right of way. Tr. 52-53.

Marylee Marlow Davids, Trustee of the Blaney B. Marlow Trust (current site owner), reviewed the history of the site, which is part of a larger property that was sold piecemeal over the years. The only thing that is left now is the subject site. She feels that the proposed veterinary hospital "would be a great way to kind of end our community involvement by having something like this that will benefit everyone." Tr. 17-19. The accessory apartment on the premises has not been used for years and could be removed. Tr. 21-22.

B. The Surrounding Neighborhood

Technical Staff defined the neighborhood of the subject property as bordered by Ed Finn Road to the north, Columbia Pike to the east, Old Columbia Pike to the west, and Fairland Road to

the south. Exhibit 20, p. 3. Charles Bailey, Petitioner's land planner, testified that the neighborhood definition provided by Technical Staff made sense to him. Tr. 98. The Hearing Examiner notes that map appended to the Staff report (Exhibit 20, Attachment 1) shows the defined neighborhood as including the confronting homes on Old Columbia Pike to the west of the site. With that inclusion, the Hearing Examiner accepts Staff's definition, and the defined neighborhood as shown on Staff's map is reproduced below:



Technical Staff described the neighborhood as follows (Exhibit 20, p. 3):

Properties within the area are mostly zoned R-90. Adjacent property to the north, south and east is owned by the State of Maryland and is Maryland Right-of-Way land for Route 29 and the ICC interchange (MD Route 200). The two properties located directly across the street are zoned R-200 and are developed with single-family homes. A gasoline station is located at the northwest intersection of Old Columbia Pike and Fairland Road. A special exception (CBA-1527-A) was approved in 1990 for a major modification (rebuild) of this site.

Petitioner's civil engineer, Patrick La Vay, described the surrounding land controlled by the State Highway Administration (SHA). To the north, the vast majority of that area is consumed and being consumed by the ICC construction. Just to the south of those interchanges, there are wetland areas, a state highway storm drain outfall, and a stream valley buffer that's shown on Exhibit 6(a), very close to the northern property line. The vast majority of the areas to the north are consumed by either the ICC or environmentally sensitive areas that would not allow for development. To the east side of the property, the interchange at Route 29 consumes a lot of that area, as shown on Exhibit 31. The area to the south is currently being used as staging activity for the state highway. The SHA indicates that they plan to house a permanent stormwater facility and potentially a park-and-ride area for either bus rapid transit or car pooling purposes. In sum, it is very unlikely that there will be residential development to the north, east or south of this site. Tr. 66-69.

According to Ms. Davids, the state doesn't know what it is going to do with the area surrounding the site that is not in the roadway right now. "They're talking about light industry. At one point they're talking about clover leaf to go over Route 29 and actually closing off Fairland Road. But right now, they didn't use as much as [they] thought they were going to use for the ICC. . . ." Tr. 19-21. She noted that there has been talk about light industry to put in there, but not about residential development. Tr. 21.

C. The Proposed Use

1. Petitioner's Proposal:

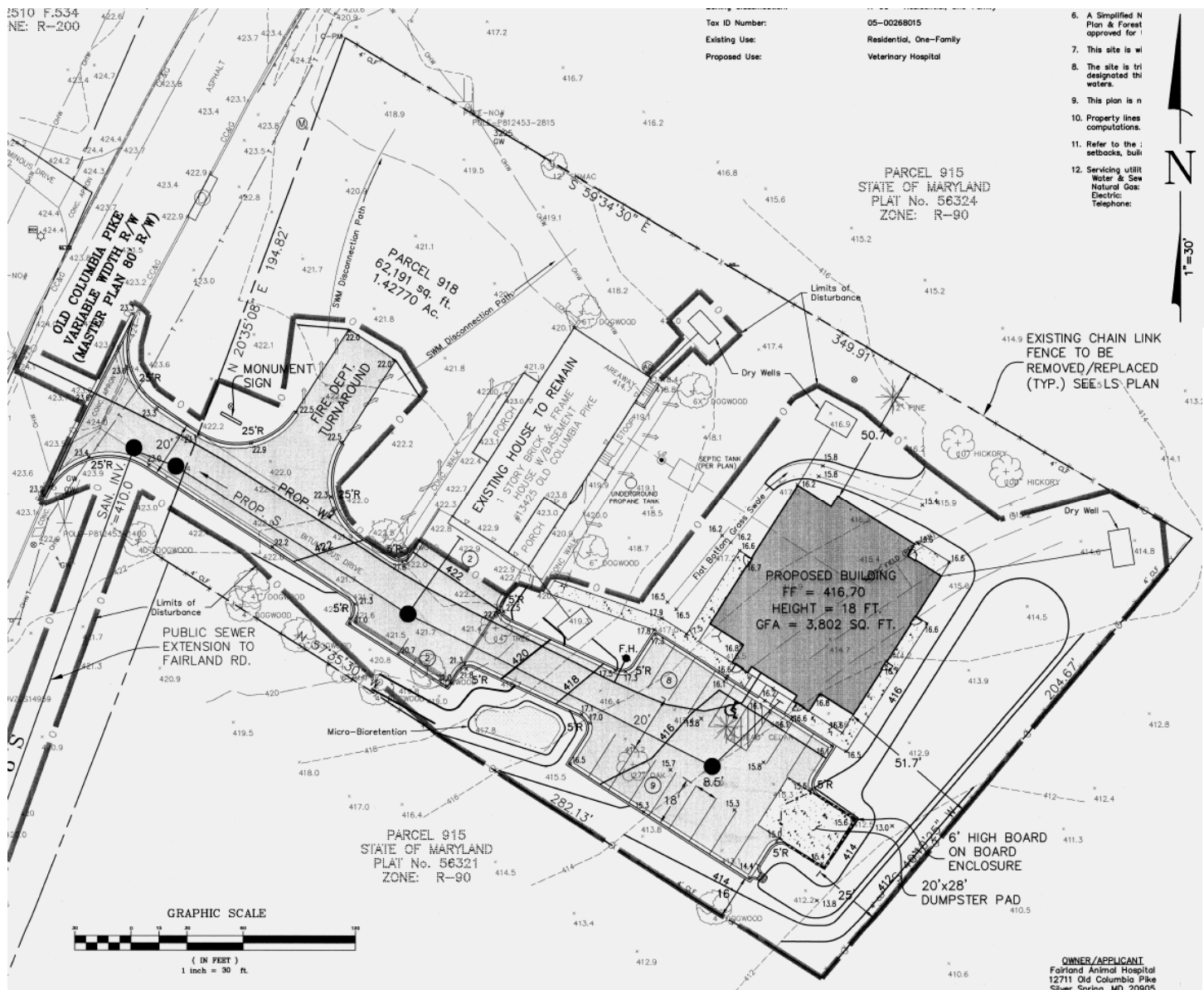
Petitioner is proposing to construct a 3,802 square foot veterinary hospital for the care of small animals to replace an existing facility located about a mile south of the subject site, on the same road. Dr. Jeffrey Whall, DVM, the veterinarian who owns Petitioner, testified that the present location has very limited parking, and his practice has grown from 700 to about 6,000 clients at this point. He therefore needs to expand to a location with more room for parking and growth. Tr. 24-28.

Petitioner plans to retain the existing single-family, detached residence on the subject site, for use by a person affiliated with the hospital and for business office use and storage. The Veterinary Hospital would be constructed on the rear (eastern) portion of the property, behind the existing residence, and would be designed to look like a barn related to the current residence. The single existing driveway will be widened and extended to the rear of the property, and 21 parking spaces would be provided for clients and employees.

2. The Site Plan, Floor Plan and Elevations:

As mentioned in the opening section of this report, the Hearing Examiner recommends approval of the original site plan (Exhibit 4(a)), which has no exterior dog run on the site. The reasons for this recommendation will be discussed in the next section of this report. The original site plan (Exhibit 4(a)) is reproduced below and on the following pages:

<u>Property Information</u>	
Subject Property:	Parcel 918 – Deer Park 13425 Old Columbia Pike Silver Spring, MD 20904 L.40070 F.183
Property Owner:	Blaney B. Marlow et.al. Trustees
Existing Parcel Area:	62,191 S.F. or 1.42770 acres
Proposed Right of Way Dedication:	0 S.F. or 0.00 Acres
Proposed Parcel Area:	62,191 S.F. or 1.42770 Acres
Zoning Classification:	R-90 – Residential, One-Family
Tax ID Number:	05-00268015
Existing Use:	Residential, One-Family
Proposed Use:	Veterinary Hospital



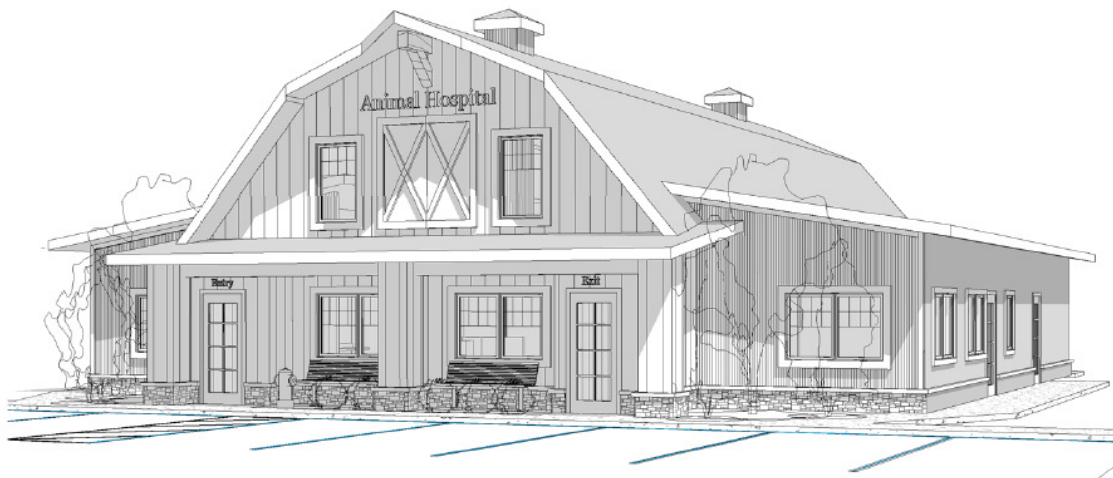
SITE NOTES

1. The topography shown is taken from a field run survey prepared by Macris, Hendricks & Glascock, P.A. in March 2011 with 2' contour intervals and supplemented with available utility records.
2. Boundary information is based on a Boundary Survey prepared by Macris, Hendricks & Glascock, P.A. supplemented with recorded deeds & plats.
3. Water and sewer categories are W-1 and S-1, respectively.
4. The property is zoned R-90. The proposed land use is Veterinary Hospital and One-Family Dwelling Unit (existing to remain.)
5. Number of lots proposed by this plan: 1 Lot
6. A Simplified Natural Resources Inventory Map/Forest Stand Delineation Plan & Forest Conservation Exemption Request (#42011183E) was approved for this property May 16, 2011.
7. This site is within the Fairland Master Plan Area.
8. The site is tributary to Little Point Branch. The State of Maryland has designated this portion of the Potomac River watershed as Class I waters.
9. This plan is not for construction purposes.
10. Property lines and areas are subject to adjustment at final plat computations.
11. Refer to the zoning data table for development standards such as, setbacks, building restriction lines and lot coverage.
12. Servicing utility companies include:
Water & Sewer: WSSC
Natural Gas: Washington Gas
Electric: Pepco
Telephone: Verizon

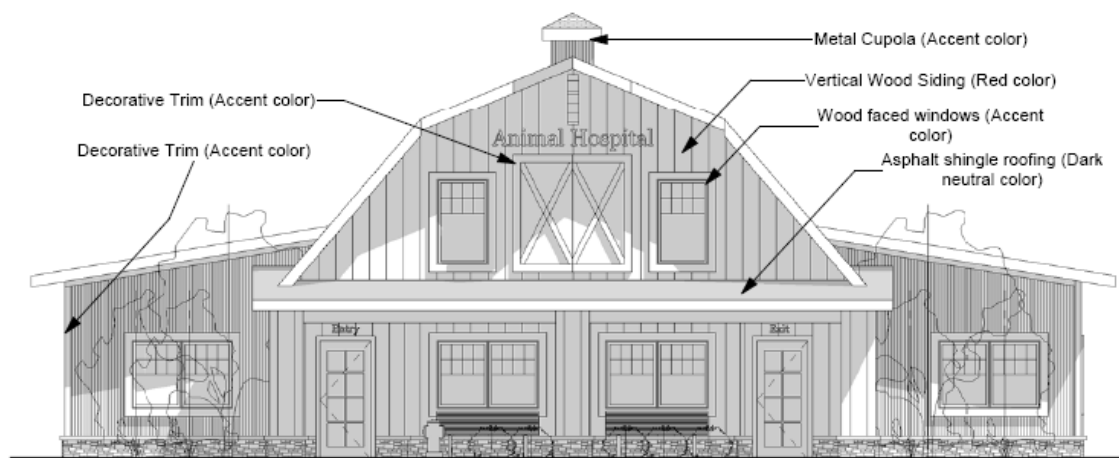
R-90 Zone/Special Exception Development Standards

	<u>Permitted/Required</u>	<u>Provided Per This Plan</u>
Minimum Tract Area: 59-C-1.321(a)	Not Specified	62,191 S.F.
Maximum Density of Development: 59-C-1.731(b)	Not Specified	1 D.U. (Existing)
Maximum Net Lot Area: 59-G-2.32(b)(1)	21,780 S.F.	62,191 S.F.
Minimum Lot Width: 59-C-1.322(b)	75 Feet	191 Feet
Minimum Setback From Street: 59-G-2.32(b)(4)	50 Feet	95 Feet
Minimum Side Yard: 59-G-2.32(b)(4)	50 Feet	51 Feet
Sum of Both Sides: 59-G-2.32(b)(4)	100 Feet	128 Feet
Minimum Rear Yard: 59-G-2.32(b)(4)	50 Feet	51 Feet
Maximum Building Height: 59-C-1.327	35 Feet	18 Feet
Maximum Lot Coverage: 59-C-1.328	30% or 18,657 S.F.	11% or 6,680 S.F.
Parking:		
Minimum Setback From Street: 59-E-2.83(b)	30 Feet	165 Feet
Minimum Side Yard 59-E-2.83(b)	16 Feet	16 Feet
Minimum Rear Yard 59-E-2.83(b)	25 Feet	25 Feet
Shading of Paved Areas 59-E-2.83(d)	30%	30%
Landscape Strip Adjacent to ROW 59-E2.71	10 Feet	N/A
Landscape Strip Adjacent to Res. Zone 59-E2.72	4 Feet	15 Feet
Internal Landscaping 59-E2.73	5%	22%
Number of Spaces 59-G-2.32(b)(9) 59-E-3.7	5 Spaces 2 Spaces	19 Spaces 2 Spaces
Accessible Parking: COMAR 05.02.02	1 Spaces	1 Spaces
Parking Distribution:		
Required Per 59-G-2.32(b)(9): Required Per 59-E-3.7	Board Specified with Minimum of 5 Spaces 2 Spaces Per Dwelling Unit @ 1 Dwelling Unit Total Required = 7 Spaces	
Provided Per Plan:		
Standard (8.5' x 18')		18 Spaces
Parallel (7' x 21')		2 Spaces
ADA Van Accessible (8' x 18' min. with 8' Access Aisle)		1 Spaces
ADA (Non-Van) Accessible Spaces (8' x 18' min. with 5' Access Aisle)		0 Spaces
Automobile Total		21 Spaces

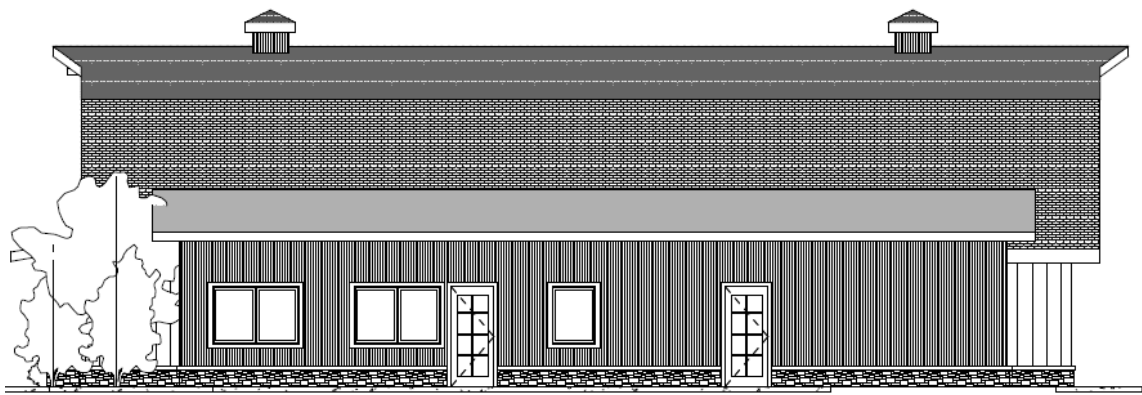
Eric Doering, Petitioner's "Development Consultant," testified that the proposed building was designed to maintain a "country type feel" in the neighborhood by minimizing the size of the building and its profile from the road. Tr. 78. It will be positioned behind the residence, so the residence will provide some screening for the building, which is depicted in the following elevations (Exhibit 4(b)):



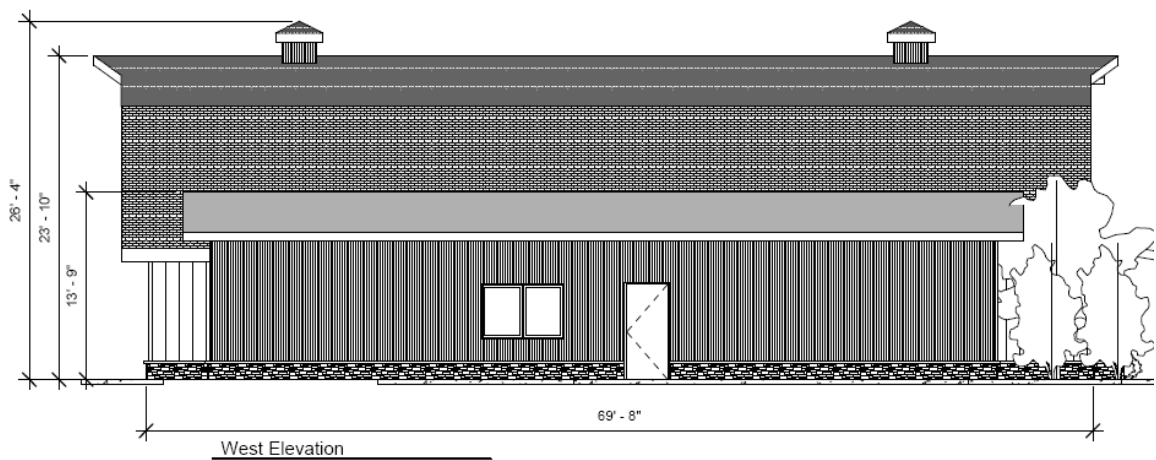
Perspective Elevation



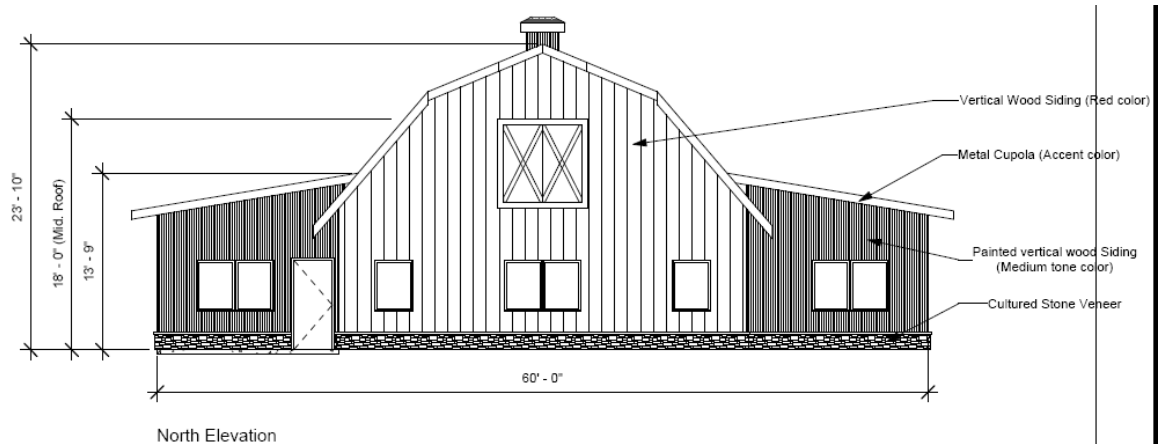
Proposed South Elevation



East Elevation



West Elevation

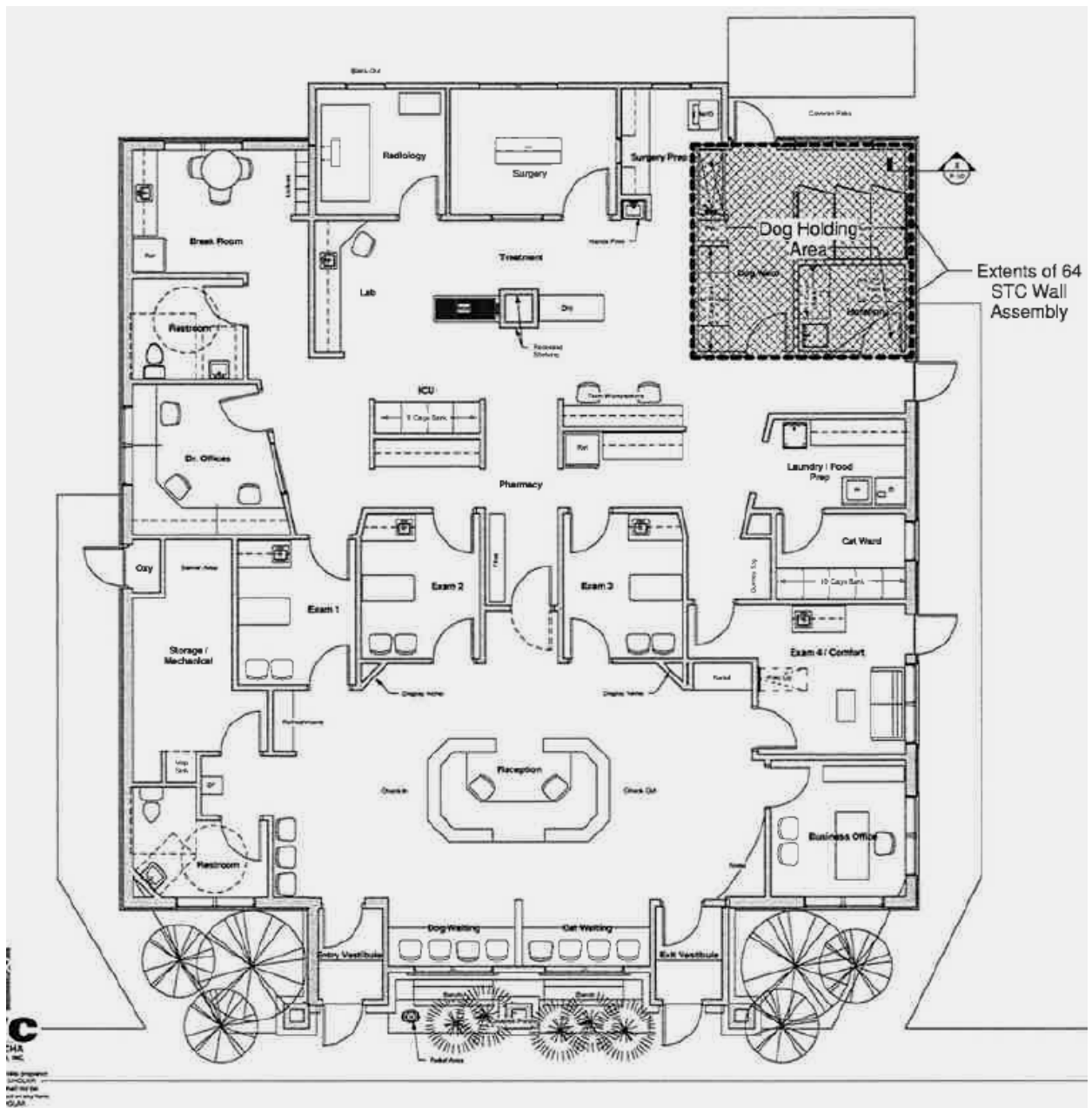


North Elevation

As shown above, the building's overall height to the top of the peak will be just under 24 feet (23 feet, 10 inches from the finished floor). The mid point in the roof is at 18 feet.

In the opinion of Charles Bailey, Petitioner's expert in land planning, nothing about the use strikes him as incompatible with the surrounding area. The fact that the existing home will remain and serve as the frontage onto Fairland, and that this is being developed as a barn structure behind is particularly appropriate. Given the character of the homes across the street, it fits in with that as well. In his professional opinion, the use and the design would be in harmony with the general character of the neighborhood. Tr. 99-101.

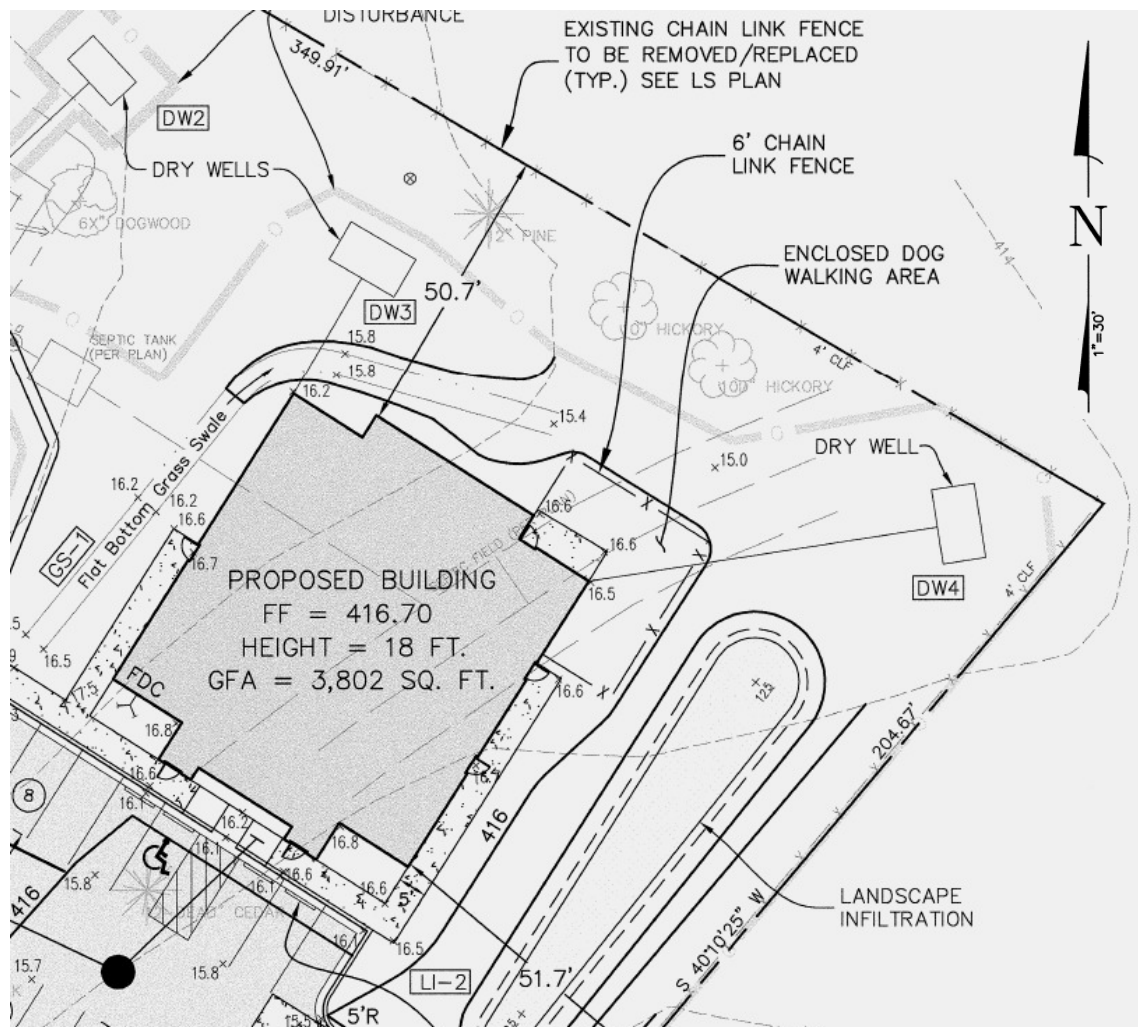
The Floor Plan for the facility (Exhibit 8(b)) is reproduced below:



As described by Mr. Doering (and shown on the above Floor Plan), the proposed south elevation has separate doors for entrance and exit, which doesn't allow the entering animals to be confronted with exiting animals. After entering, clients walk into a reception area, and behind that there will be four client exam rooms in the front half of the building. The back side of the building is going to be the clinical side, where treatments are going to be done, such as surgeries and x-rays. The back corner of the building will have an animal holding area. Tr. 81.

3. Alternative Site Plan with an Exterior Dog Run:

Petitioner proposed an alternative site plan (Exhibit 30(c)(1)) and Landscape Plan (Exhibit 30(c)(2)), which would add a fenced-in, exterior dog run to the northeast corner of site, away from any residential uses. The northeast corner as proposed in the alternative site plan is shown below:



The Planning Board found that such an outdoor dog run would not create an adverse impact on surrounding properties (Exhibit 28, p. 2), but expressed concern as to whether it would be in compliance with the language of Zoning Ordinance §59- G-2.32(b)(2), which provides that “[e]xterior areas used to exercise, walk, or keep animals must be set back from any property line 200 feet and screened from adjacent residential properties. [Emphasis added.]” The Planning Board expressly declined to opine on the legal issue of statutory interpretation.

Petitioner argued that the dog run would be good for the animals and that the rationale for this statutory restriction did not apply in this case because the dog run would be more than 200 feet from any property line adjacent to actual residential uses; it would be less than 200 feet only from property lines adjacent to state land which is being used for roads and would continue to be so used in the future. Tr. 39-43. Initially, the Hearing Examiner thought that the statutory language in question pertained to exterior dog runs within 200 feet of residential properties; however, a more careful reading revealed that the language relating to “residential properties” pertains to the screening requirement only. The language relating to the required setback applies to all property lines in residential or rural zones where the veterinary hospital is permitted by special exception.

Even crediting all of Petitioner’s testimony regarding the current and predicted uses of the land to the north, east and south of the site (Tr. 66-69 and 95-97), and accepting that the proposed exterior dog run would not be incompatible the surrounding uses, the Hearing Examiner cannot recommend permitting the exterior dog run because to do so would clearly violate the unambiguous terms of the statute. As much as the Hearing Examiner might wish to recommend approval of a plan that would benefit the animals without harming the surrounding uses, the rules of statutory interpretation do not give us quite that much leeway.

The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

On the other hand, this standard must be considered in light of the following language from *Maryland-National Capital Park and Planning Commission v. Anderson*, 164 Md. App. 540, 569-570, 884 A.2d 157, 174 (2005), *aff'd on appeal*, 395 Md. 172 (2006):

Even under the plain meaning rule, however, we do not ignore the Legislature's purpose if it is readily known. *State v. Pagano*, 341 Md. 129, 133, 669 A.2d 1339 (1996). In this regard, “we may ... consider the particular problem or problems the legislature was addressing, and the objectives it sought to attain.” *Sinai Hosp. of Baltimore, Inc. v. Department of Employment & Training*, 309 Md. 28, 40, 522 A.2d 382 (1987); see also *Romm v. Flax*, 340 Md. 690, 693, 668 A.2d 1 (1995).

The court also stated, “To effectuate the Legislature’s intent, we may consider ‘the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result...’” *Maryland-National Capital Park and Planning Commission v. Anderson*, *supra*, 164 Md. App. at 570, 884 A.2d at 174-175 (2005).

The *Anderson* decision provides some basis for looking underneath the language of a statute to give effect to the framers’ intent. The Hearing Examiner thus considered whether *Anderson’s* rationale provides a basis for ignoring the plain wording of Zoning Ordinance §59-G-2.32(b)(2) to carry out its perceived purpose. Upon reflection, however, the Hearing Examiner concluded that the *Anderson* doctrine should only be applied when the application of the statutory language in a

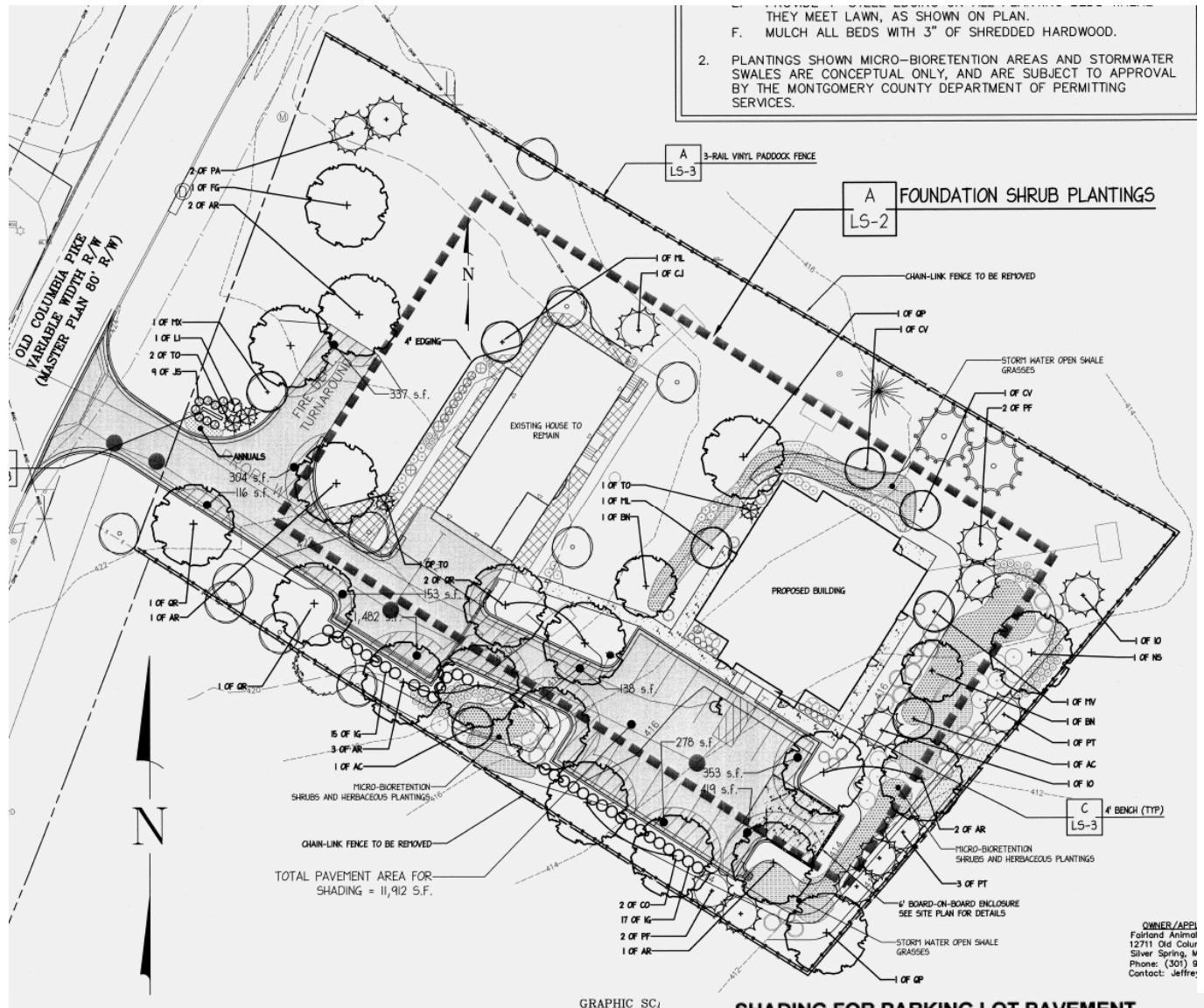
particular case would be at cross-purposes with the statutory intent, so as to defeat the purposes of the legislature. That is not the case here.

The express intent of the language in question is to prohibit exterior dog runs within 200 feet of any property line in a residential or rural zone. That intent can only be carried out by enforcing the stated setback. The purpose behind that prohibition was presumably to avoid any risk of excessive noise to the neighbors. That purpose can be accomplished by enforcing the setback, though that purpose may also be met in this case without enforcing it. In any event, prohibiting the exterior dog run will not result in the noise risk the Council sought to avoid; it will merely take steps to avoid the noise risk where those steps are not necessarily needed. The Hearing Examiner concludes that such a result does not justify ignoring the plain wording of the statute. The prohibition against an exterior run within 200 feet of a property line is expressed in absolute terms for veterinary hospitals “[i]n any residential or rural zone where permitted by special exception.” Zoning Ordinance §59-G-2.32(b). Whether or not the statutory restriction was crafted too broadly to accomplish the Council’s underlying intent is not for us to decide. We must follow the unambiguous language of the Zoning Ordinance.

4. Landscaping, Lighting and Signs:

In addition to the other plans reproduced above, Petitioner introduced plans showing proposed landscaping, lighting and signage. Technical Staff reports that “[t]he subject site will be well landscaped with a mix of shade, ornamental and evergreen trees. A variety of shrubs, ornamental grasses and ground covers will also be provided to help retain the residential character of the property. The property will be fenced with a new 3-rail, vinyl paddock to provide attractiveness as well as to provide security.” Exhibit 20, p. 5. The original Landscape Plan (Exhibits 5(c)-(e)) is

shown below (The alternative landscape plan, Exhibit 30(c)(2), is not shown because it includes that exterior dog run discussed in the previous section):



SHADING FOR PARKING LOT PAVEMENT
for a Special Exception Use in a Residential Zone
(Sec. 59-E-2.83)

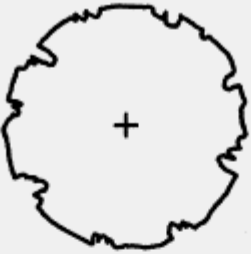

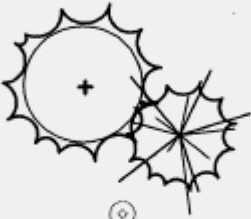



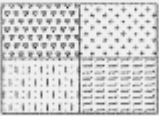


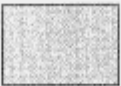

PARKING LOT SHADE TREE LIST		
BOTANICAL NAME	COMMON NAME	15 YEAR CANOPY (DIA. IN FT)*
Acer rubrum	Red Maple	36
Celtis occidentalis	Hackberry	34
Quercus rubra	Red Oak	26

*Unless otherwise indicated, all 15-year canopy diameters are calculated as 75% of the 20-year canopy shown in the Montgomery County Trees Technical Manual (September 1992), Appendix C, 'Plant Species Information: Montgomery County Maryland Landscape Tree Evaluation Criteria'.

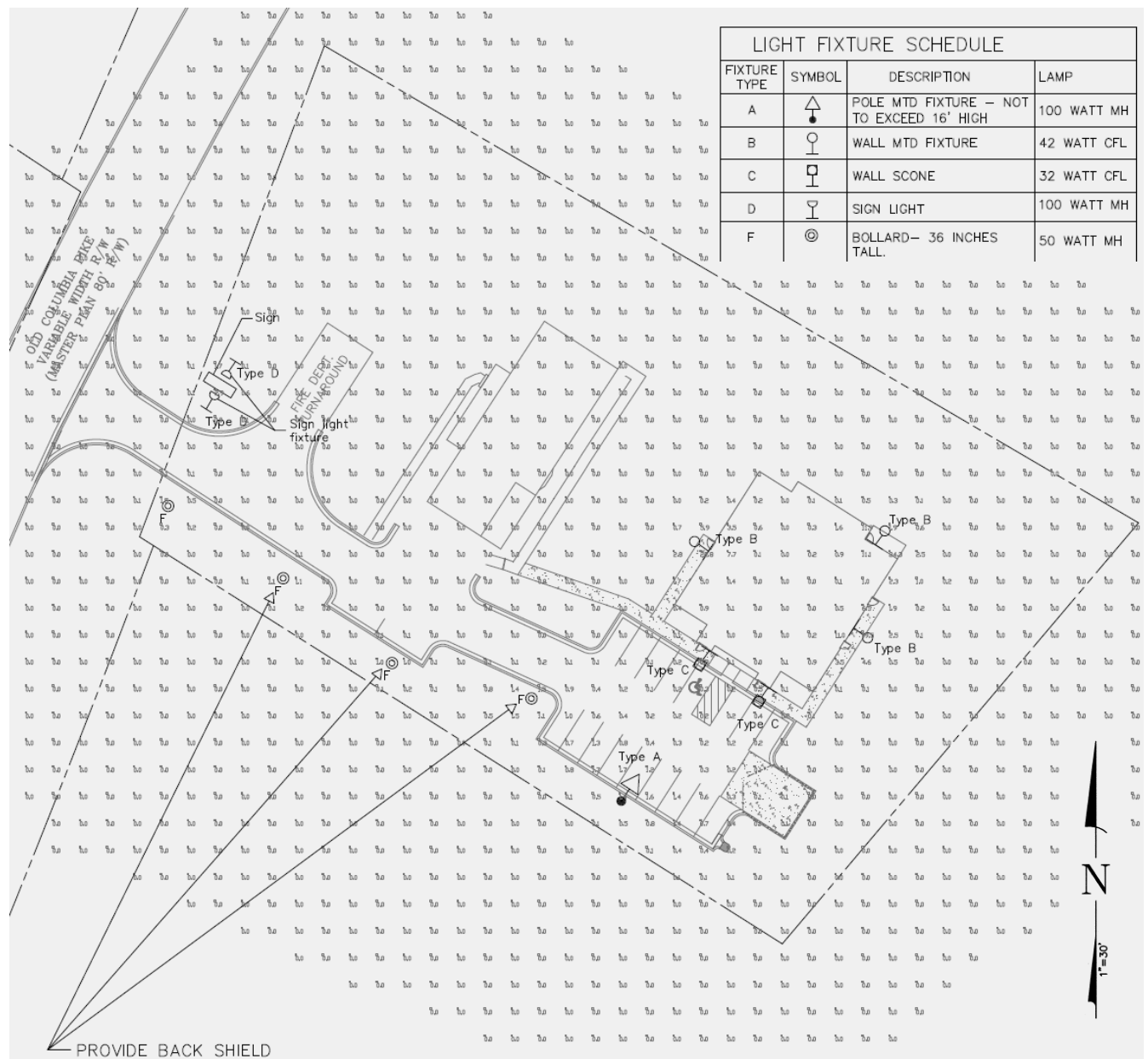
Parking Lot Pavement Area	= 11,912 s.f.
Shaded area required (30% of Total Pavement Area)	= 3,574 s.f.
Total Shaded area provided	= 3,580 s.f.

NOTES:

1. SIGNIFICANT NUMBERS OF HERBACEOUS AND WOODY SHRUBS REMAIN IN FOUNDATION BEDS AROUND THE EXISTING HOUSE. CLEAN UP ALL BEDS (SEE HATCHED AREAS) AS FOLLOWS:
 - A. REMOVE CINDER BLOCKS, EDGING MATERIALS AND MISCELLANEOUS DEBRIS FROM ALL GARDEN BEDS.
 - B. REMOVE GARDEN ORNAMENTS AS DESIRED BY OWNER.
 - C. CLEAN OUT ALL DEAD OR DYING PLANT MATTER.
 - D. PRUNE DEAD BRANCHES FROM EXISTING SHRUBS AND ORNAMENTAL TREES.
 - E. PROVIDE 4" STEEL EDGING ON ALL PLANTING BEDS WHERE THEY MEET LAWN, AS SHOWN ON PLAN.
 - F. MULCH ALL BEDS WITH 3" OF SHREDDED HARDWOOD.
2. PLANTINGS SHOWN MICRO-BIORETENTION AREAS AND STORMWATER SWALES ARE CONCEPTUAL ONLY, AND ARE SUBJECT TO APPROVAL BY THE MONTGOMERY COUNTY DEPARTMENT OF PERMITTING SERVICES.

LEGEND	
	PROPOSED SHADE TREES
	PROPOSED ORNAMENTAL TREES
	PROPOSED EVERGREEN TREES
	PROPOSED ORNAMENTAL GRASSES
	PROPOSED DECIDUOUS SHRUBS
	PROPOSED EVERGREEN SHRUBS
	PROPOSED GROUND COVER AND HERBACEOUS PLANTS
	EXISTING FOUNDATION PLANTING BEDS TO BE CLEANED UP AS NOTED
	EXISTING TREES
	TOTAL PARKING LOT AREA SUBJECT TO 30% SHADING REQUIREMENT
	PARKING LOT AREA TO BE SHADED BY 15-YEAR TREE CANOPY

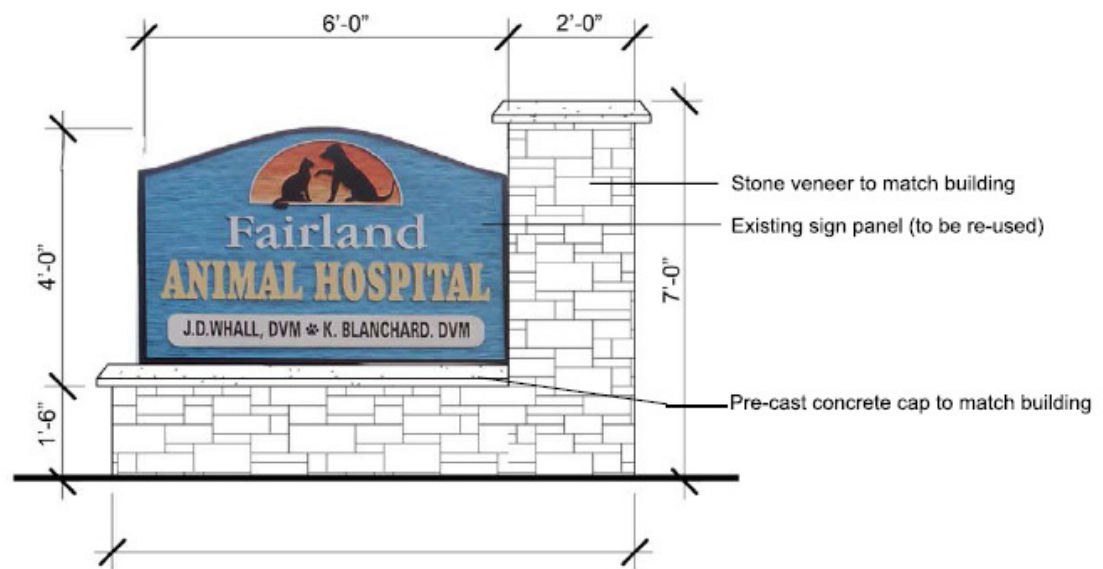
Lighting proposed for the site is shown in a revised Lighting and Photometric Plan (Exhibit 44(a)). This Plan is a version that was modified as a result of the hearing because the original plans showed photometrics exceeding permitted limits in one corner of the site. The problem was resolved by slightly shifting some fixtures and adding shields (Exhibit 44(b)). The photometrics, as shown below on the revised plan, are compliant with statutory restrictions limiting light at the side and rear lot lines to 0.1 footcandles. Zoning Ordinance §59-G-1.23(h).



Technical Staff approved the lighting proposed for the site (Exhibit 20, p. 11):

The Lighting Plan submitted with the special exception application demonstrates that the application achieves the required standards. The site is in a residential zone, and the lighting plan adequately and efficiently covers the main vehicular access to the site, as well as the parking, areas in order to create a safe vehicular and pedestrian environment. There is no residential property adjacent to the proposed special exception. . . .

Petitioner proposes an up-lighted entry sign just north of the drive aisle that connects to public right of way. It would be set back five feet from the property line, and the dimensions of the sign itself would be 6 feet wide by 4 feet high. However, it would be mounted on stone base, which would make the overall dimensions approximately nine feet in length and seven feet in height. It is depicted on the Landscape Plan (Exhibit 5(e)), and on the Site Elevations (Exhibit 4(b)):



Monument Sign Elevation

Petitioner concedes that the sign will require a variance from the Sign Review Board since it will exceed the maximum two-square-foot requirement for a sign in a residential zone. Tr. 62-65. The size of the sign obviously exceeds the two square feet ordinarily allowed in a residential area

pursuant to Zoning Ordinance §59-F-4.2(a)(1); however, since it will be at the entrance to a veterinary hospital, it may be considered by the Department of Permitting Services as a sign at the entrance to a “place of assembly,” which is defined in Zoning Ordinance §59-F-2 as “Any place of worship, school, library, museum, or hospital.” If it does so qualify, then larger dimensions and illumination are permitted under Zoning Ordinance §59-F-4.2(a)(3)(B).

Whether or not a sign variance is required in order for Petitioner to obtain a sign permit, the Board of Appeals must first decide whether the proposed sign would be compatible with the area and promote traffic safety. The only evidence on these points indicates that it would satisfy both criteria. Petitioner’s land planner, Charles Bailey, opined that the proposed sign would be compatible, and even on the small side. He also feels that illuminating it from the ground versus being internally illuminated would give it a nicer character. Tr. 103. Technical Staff found that “The sign will be setback from the roadway in manner that its visibility and function will not adversely affect traffic or the neighborhood.” Exhibit 20, pp. 10-11.

Based on this evidence, the Hearing Examiner finds that the proposed sign would not adversely affect traffic and that it would be compatible with the area. The following condition is recommended in Part V of this report:

A sign permit must be obtained for the proposed monument sign, and a copy of the permit for the approved sign must be submitted to the Board of Appeals before the sign is posted. If required by the Department of Permitting Services, Petitioner must obtain a sign variance for the proposed sign or amend the design of the proposed sign to have it conform with all applicable regulations. If the design is amended, a diagram showing the amended design must be filed with the Board.

5. Operations:

The proposed operations at the site were summarized by Technical Staff (Exhibit 20, p. 3):

. . . Services offered will include, but not [be] limited to, routine examinations, holding areas, treatments and surgery. The sale of pet food and medicine and supplies is anticipated, but will not exceed 20% of the gross receipts. All

services will be inside the building. The hours of operation⁴ will be Monday through Friday, 7:30 a.m. to [7:30] p.m. and Saturday, 8:00 a.m. to [5:00] p.m. Staffing will vary according to the demands for services and at maximum periods of utilization will be no more than ten employees (three veterinarians, five veterinary technicians, and two receptionists). According to the applicant, client scheduling will be steady throughout any given day with a modest increase in traffic activity for surgery/procedure drop-offs from 7:30 a.m. thru 9:00 a.m. and pick-ups from 5:00 p.m. to 7:00 p.m.

Dr. Whall's practice is all for small animals, ninety-nine percent cats and dogs, with a few "pocket pets," such as gerbils, hamsters and guinea pigs. During the weekdays, Monday through Friday, the first person, usually the tech, arrives at 7:30 a.m. to open up and to start tending to whatever animals might be there overnight. Then the receptionist comes not too soon after that, and maybe another tech. Official office hours start at 9 o'clock. Dr. Whall shows up at 8:59, and office hours are from 9:00 to 12:00 and 4:00 to 7:00 each day. Those hours are arranged somewhere between 15 and 30-minute appointments. Some appointments are brief, and others take longer, and they're judged according to that. In a three-hour span, Dr. Whall could see anywhere from six to 12 patients. There is one other full-time vet that Petitioner just hired. Tr. 29-30.

Usually in the middle of the day, there are no appointments from 12:00 to 4:00. Dr. Whall does surgeries, dentals and lab work, and makes phone calls and the like during that period. Clean-up usually ends up about 7:30 PM, and the staff gets out. Office hours have always been from 9:00 to 1:00 on Saturday, and the first staff person would arrive at 8 o'clock in the morning on Saturday's. Based on commentary at the Planning Board meeting, Petitioner is requesting that the Saturday hours be permitted until 5 PM, though Petitioner may not extend the actual hours till then. Tr. 31-32.

Dr. Whall further testified that no more than 10 employees, including up to three veterinarians would be on site at any given time. Tr. 35-36. A log will be maintained of client

⁴ The proposed hours of operation changed after Technical Staff's review based on the Planning Board's recommendation for Saturday hours running up to 5 p.m. (Exhibit 28), and on Dr. Whall's testimony at the hearing to the effect that cleanup on the weekday evenings may last till 7:30 p.m. Tr. 31. To avoid confusion, the Hearing Examiner has substituted those revised hours (in brackets) into the quotation from the Technical Staff report.

visits, and there will be no boarding, but an animal that has had surgery or is ill may have to stay overnight. One or two of the staff members may live in the house on site, for oversight. Tr. 36-37.

Dr. Whall noted that the house on site may be used to store records, in addition to having a staff person living there. There will be no dog grooming, but some pet food and retail items may be sold on site. Tr. 46-47.

According to Mr. La Vay, the parking pad outside of the garage will be preserved, and that will provide two spaces for the existing dwelling. Immediately in front of the proposed building will be a parking facility that incorporates 17 spaces. Two additional spaces were added to the south of the existing house as an overflow extra. This adds up to 21 spaces, not counting the parking space in the garage. Tr. 55-56. Technical Staff reports that the proposed special exception satisfies all parking requirements (Exhibit 20, p. 10):

Section 59-E-2.32(b)(9) requires the following for a veterinary hospital: a minimum of five (5) parking spaces and two (2) parking spaces for the existing residence for a total of seven(7) spaces. Per the proposed site plan, a total of nineteen (19) parking spaces, including one (1) handicapped accessible parking space are provided for clients and employees for the proposed use veterinary hospital. The parking will be located in the rear of the property adjacent to the southern lot line that adjoins State owned right-of-way property. Two parking spaces will be retained for the existing residence.

6. Public Facilities:

Since the proposed use will require subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9)(A), approval of this special exception must be conditioned upon approval of a preliminary plan of subdivision by the Planning Board. Such a condition is recommended in Part V of this report. It also provides that, if changes to the site plan or other plans filed in this case are required at subdivision, Petitioner must file a copy of the revised site and related plans with the Board of Appeals.

Nevertheless, Petitioner produced testimony by Craig Hedberg, an expert in transportation planning and traffic engineering. Tr. 103-113. He prepared a transportation statement (Exhibit 17(a)), which projected a maximum of 18 peak hour trips for the site (in the PM peak hour). Because that is under 29 peak hour trips, Petitioner did not have to do a full local area transportation review (LATR) or analyze external intersections.

The policy area mobility review (PAMR) requirement must also be satisfied, and in the Fairland policy area, the requirement is that 45 percent of the trips generated are subject to a PAMR mitigation requirement. The end result is that approximately eight trips must be mitigated with a payment of about \$93,800.

In Mr. Hedberg's professional opinion, the transportation networks surrounding the subject property would be adequate to accommodate the traffic that would be generated by the proposed use. Also, the circulation on the site and the access to the site will be safe, adequate and efficient for the proposed use. Tr. 104-106.

Mr. Hedberg further opined that this site would not diminish safety for vehicular or pedestrian traffic the way it is designed, and the roadway system is adequate for this project. Tr. 112-113.

Technical Staff confirmed Mr. Hedberg's findings, stating the following (Exhibit 20, p. 4):

The vehicular access point, commercial driveway, will be provided from Old Columbia Pike which was built as a primary residential street with 80-foot-wide right-of-way. Staff finds that the proposed access point and on-site vehicular and pedestrian circulation system shown on the site plan are adequate. The existing road system in the vicinity of the site would not be affected by the proposal. Staff has not recommended any transportation-related conditions to support granting of the subject Special Exception, since the application meets the transportation-related requirements of the APF test. The proposed use will not have an adverse effect on the transportation network within the immediate local area.

D. The Master Plan

The subject site is in the area covered by the 1997 Fairland Master Plan. Technical Staff reports that the subject property is surrounded by Analysis Area 5A of the Plan's Fairland Road West District, but this individual property is not included in the Analysis Area. According to Staff, at the time of the Plan's development, an occupied single-family house sat on the subject property, and Analysis Area 5A was undeveloped. The 1997 Plan anticipated substantial use of the property in connection with construction of the US 29/ICC interchange, and recommended retaining the existing R-90 Zone for the property. The Master Plan encouraged cluster development "to provide adequate setbacks along Fairland Road, US 29, and the proposed ICC interchange (p. 54)." Exhibit 20, pp. 3-4.

The subject property remained in the R-90 Zone, and Technical Staff concluded that the Plan's intent for the property was that "it remains for uses available in that zone." Exhibit 20, pp. 3-4. Because the proposed animal hospital is an allowable special exception use in the R-90 Zone, Staff also concluded that Petitioner's proposal is consistent with the 1997 Fairland Master Plan.

The Hearing Examiner agrees with the Technical Staff's conclusion that the application is therefore in conformance with the Master Plan.

E. Environmental Impacts (including Noise)

A Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) was approved for this site on May 16, 2011. Exhibit 6(a). The property is located within the Little Paint Branch Watershed, but according to Technical Staff, is not located within a Special Protection Area (SPA), nor is it located within the Patuxent River Primary Management Area (PMA). Exhibit 20, p. 4. Staff also noted that there are no existing streams, wetlands, 100-year floodplains, steep slopes, highly erodible soils or environmental buffers on the site.

1. Forest Conservation:

A Forest Conservation Plan Exemption (42011183E) was confirmed for this site by planning staff on May 16, 2011, under §22A-5(s)(1) of the County's Forest Conservation Law. Exhibit 6(b). The Exemption is for an activity occurring on a tract of land less than 1.5 acres with no existing forest, or existing specimen or champion trees, and the afforestation requirements would not exceed 10,000 square feet. The project does not propose the removal of any forest or specimen trees, and Technical Staff concluded that "The application meets the requirements of Chapter 22A of the Montgomery County Forest Conservation Law." Exhibit 20, pp. 4-5.

2. Stormwater Management:

Petitioner's civil engineer, Patrick La Vay, testified that the stormwater management concept plan (Exhibit 11) includes environmental site design to the maximum extent practicable, which is mandated by the Stormwater Management Act of 2007. The approach to stormwater management includes landscape infiltration, some dry wells, a grass well and then a few areas to treat runoff from impervious surfaces. Tr. 56-57. The concept plan was approved by the Department of Permitting Services on September 27, 2011 (Exhibit 33).

3. Noise:

The issue of potential noise from the veterinary hospital was reviewed by Technical Staff and was addressed at the hearing. Petitioner produced a letter from Joe Wicentowich, the architect of the proposed facility (Exhibit 27(a)), and a diagram of the facility's exterior wall (part of Exhibit 8(b)) to demonstrate that sound would be adequately insulated. Mr. Joe Wicentowich letter stated:

This is a supplement to the floor plan and site plan document dated November 15, 2011 which indicates the extent of animal holding within the proposed facility.

The proposed sound enclosure to envelope the interior dog holding areas (Dog Ward and Isolation Ward) shall be constructed as an STC 64 rated assembly. This

assembly test data is attached herein which indicates the laboratory test results indicating sound transmission loss weighted over six frequencies.

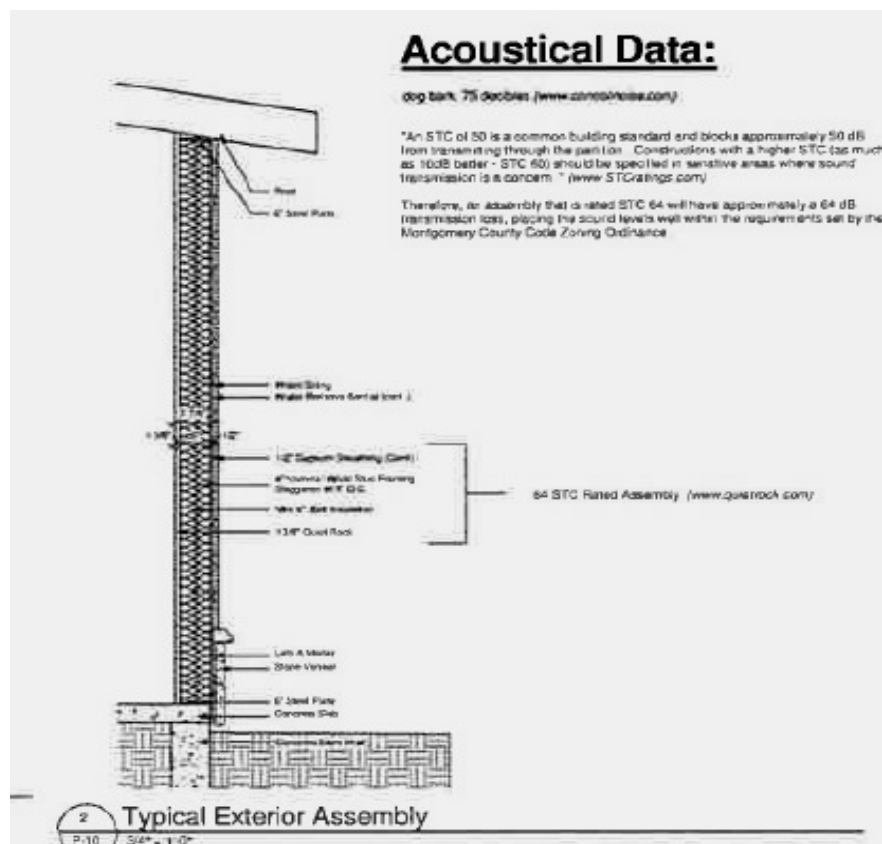
As the ordinance calls for a transmission drop to a maximum of 40 dBA measured at ten feet from the structure, in addition to a maximum of 50 and 60 dBA at the property lines (varied by time and distance), the STC 64 rated assembly would prove to be an effective application to achieve these requirements.

Laboratory studies have indicated that a barking dog may achieve up to 100 dBA in an enclosed environment ("Noise in the Animal Shelter Environment: Building Design and the Effects of Daily Noise Exposure", by Crista L. Coppola, Journal of Applied Animal Welfare Science, 9(1), 1-7, 2006 Lawrence Erlbaum Associates, Inc., 2006).

Through extensive analysis it has been determined that the sound transmission class (STC) rating of an acoustical barrier roughly indicates the weighted decibel drop through that assembly as an average of six test frequencies. ("Walls, Enclosures, and Barriers" and "Noise Insulation Ratings" – The Science and Application of Acoustics by Daniel R. Raichel, Springer, 2000)

Thus, it may be ascertained that the proposed STC 64 rated assembly to be implemented in the design and construction of the animal holding enclosure, would suffice to provide a decibel drop of 64 from a peak of 100 dBA, to 36 dBA outside of the enclosure. This would prove to be in compliance with the Zoning Ordinance.

The diagram from Exhibit 8(b) is reproduced below:



After the hearing, Petitioner supplemented the record with a letter (Exhibit 42(a)) from Richard J. Peppin, an engineer who is Board Certified in “Noise Control Engineering,” according to his resume (Exhibit 30(a)). Mr. Peppin’s letter indicates that he reviewed all of the materials regarding noise relating to this case and affirms that the proposed facility will be sufficiently insulated to ensure compliance with the applicable statutory noise standards.

Technical Staff also concluded that the proposed facility would comply with applicable noise standards. Staff noted that “The animals will be kept inside and will not generate unacceptable noise.” Exhibit 20, p. 6. Technical Staff also agreed with the analysis of Petitioner’s architect (Exhibit 20, p. 12):

The exterior assembly of the walls has been designed for noise mitigation. The walls will be rated STC 64 which will result in a transmission loss of approximately 64 dB. Since a dog bark is considered 75 decibels, a wall that reduces that noise transmission by 64 dB places the sound level well within the requirement of 40 dBA set by the Zoning Ordinance.

Staff concluded (Exhibit 20, p. 7):

Staff finds that the proposed use will not create any noise inconsistent with noise levels that now exist in the area. According to the acoustical study submitted by the applicant, the exterior walls will be constructed in a manner that would place the sound levels well within the requirements of the Zoning Ordinance. There will be no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site.

Based on this record, the Hearing Examiner finds that the proposed use will not create noise in excess of the prescribed statutory limits.

F. Community Response

As mentioned in Part I of this report, there has been no opposition in this case. The only community witness was Marylee Davids, Trustee of the Blaney B. Marlow Trust, the owner of the site. She testified in support of the application. Tr. 17-22, 49-50. Given this record, the Hearing Examiner concludes that any community concerns have been appropriately addressed.

III. SUMMARY OF THE HEARING

Petitioner called six witnesses to testify at the hearing, Dr. Jeffrey Whall, DVM and his wife, Maggie Whall, who own the Petitioner; Patrick La Vay, a civil engineer; Eric Doering, a development consultant for veterinary hospitals; Charles Bailey, a land planner and landscape architect; and Craig Hedberg, a transportation planner. Marylee Davids, Trustee of the Blaney B. Marlow Trust (current site owner) also testified in support of the petition. There were no other witnesses at the hearing.

A. Petitioner's Case

1. Dr. Jeffrey Whall, DVM (Tr. 23-48):

Dr. Jeffrey Whall, DVM, testified that he and his wife are the principals of the Petitioner, a corporation. Presently, the Fairland Animal Hospital is located at 12711 Old Columbia Pike, Silver Spring, Maryland 20904, about .95 miles south of the subject site, on the same road. They agreed to be bound by any terms and conditions imposed for a special exception. Tr. 23.

Dr. Whall is a veterinarian, and Mrs. Whall is a nurse. Dr. Whall summarized the history of his veterinary practice and the Fairland Animal Hospital. The present location has very limited parking, and his practice has grown from 700 to about 6,000 clients at this point. He therefore needs to expand to a location with more room for parking and growth. He eventually located the subject site, and with the assistance of Eric Doering, have put together this plan. Tr. 24-28.

Dr. Whall's practice is all for small animals, ninety-nine percent cats and dogs, with a few "pocket pets," such as gerbils, hamsters and guinea pigs. During the weekdays, Monday through Friday, the first person, usually the tech, arrives at 7:30 a.m. to open up and to start tending to whatever animals might be there overnight. Then the receptionist comes not too soon after that, and maybe another tech. Official office hours start at 9 o'clock. Dr. Whall shows up at 8:59, and Office

hours are from 9:00 to 12:00 and 4:00 to 7:00 each day. Those hours are arranged somewhere between 15 and 30-minute appointments. So some appointments are brief, and others take longer, and they're judged according to that. In a three-hour span, Dr. Whall could see anywhere from six to 12 patients. There is one other full-time vet that Petitioner just hired. Tr. 29-30.

Usually in the middle of the day there are no appointments from 12:00 to 4:00. Dr. Whall does surgeries, dentals and lab work, and makes phone calls and the like during that period. Clean-up usually ends up about 7:30 PM, and the staff gets out. Office hours have always been from 9:00 to 1:00 on Saturday, and the first staff person would arrive at 8 o'clock in the morning on Saturday's. Based on commentary at the Planning Board meeting, Petitioner is requesting that the Saturday hours be permitted until 5 PM, though Petitioner may not extend the actual hours till then. Tr. 31-32.

Dr. Whall further testified that no more than 10 employees, including up to three veterinarians would be on site at any given time. Tr. 35-36. A log will be maintained of client visits, and there will be no boarding, but an animal that has had surgery or is ill may have to stay overnight. One or two of the staff members may live in the house on site, for oversight. Tr. 36-37.

Dr. Whall explained why it would be preferable to have an outdoor dog run for dogs which stay on the premises. They've been trained not to go inside, and they normally would go out on their walk to relieve themselves. They would not be left out and would just be walked and come right back in. The alternative would be to have a little artificial spot for the dogs inside. Tr. 37-39.

[Petitioner's attorney, Jody Kline, noted that Section 59-G-2.32(b)(2) provides that exterior areas used to exercise, walk or keep animals must be set back from any property line 200 feet and screened from adjacent residential properties. Unfortunately, the width of the lot at the rear lot line is only 204 feet wide, and there is no way to locate an exterior dog-walk area that will comply with this provision. Mr. Kline argued that the area to the north, east and south of the site is state right-of-

way that's not going to be developed as residential property and shouldn't be treated as residential property. He asked that the Board therefore waive that provision by saying there are not adjacent residential properties. Petitioner would agree to a condition that if any land within 200 feet of that area was developed as residential, the authorization for an outside exercise area would terminate. According to Mr. Kline, the exterior walk area designated in the alternative plan is at least 200 feet from the actual residential properties to the west of the site. It is 240 feet to the front of the property, and it is about another 75 to 100 feet to the nearest residence. So, there would be at least 300 linear feet from the R-90 lots on the far side of Old Columbia Pike. Tr. 39-43.]

Dr. Whall explained how waste material would be handled and how animals that have to be euthanized would be disposed. Tr. 44-45.

Dr. Whall explained that the house on site may also be used to store records, in addition to having a staff person living close. There will be no dog grooming, but some pet food and retail items may be sold on site. Tr. 46-47.

2. Maggie Whall, DVM (Tr. 24, 45-46):

Maggie Whall testified that she is a nurse. She indicated that Petitioner uses a company called Stericycle to dispose of all the hazardous waste from the facility.

3. Patrick La Vay (Tr. 50-71):

Patrick La Vay testified as an expert in civil engineering. He described the property, noting that the vegetation on the site is mostly grass, with the exception of some small landscaping associated with the existing house. There is no area meeting the definition of forest on site, and there are no specimen trees or champion trees. There are no streams, wetlands, stream valley buffers or flood planes on site, and the site is not within a special protection area or a primary management area.

There is an existing asphalt driveway, approximately 18 feet in width and a parking pad associated with an existing house, a brick one-story structure. At the front of the existing house, which is the western portion of the property, there are gentle slopes of two to three percent range. As you move to the east behind the existing house, the slopes increase to approximately five percent. There's a drainage divide that runs diagonally across the property from west to east, and all drainage does eventually end up in the Route 29 right of way. Tr. 52-53.

Mr. La Vay indicated that the site will have to go through subdivision, and an initial application for a preliminary plan of subdivision was filed with the Park and Planning Commission. He then described the proposed external dog run. The area is shown as approximately 750 square feet. It would be grass extending out from the building 12 feet in either direction, and in length it's approximately 30 feet. It would be enclosed by a six-foot-high chain-link fence to secure the area, and screened with some landscaping as shown on the revised landscape plan. Tr. 54-55.

According to Mr. La Vay, the existing dwelling unit by code requires two parking spaces, and the special exception requires a minimum of five spaces for the veterinary office. The drive way leading to the proposed structure passes through the existing driveway to the house. The parking pad outside of the garage will be preserved, and that will provide two spaces for the existing dwelling. Immediately in front of the proposed building will be a parking facility that incorporates 17 spaces. Two additional spaces were added to the south of the existing house as an overflow extra. This adds up to 21 spaces, not counting the parking space in the garage. Tr. 55-56.

Mr. La Vay further testified that the stormwater management concept was approved by the Department of Permitting Services on September 27, 2011 (Exhibit 33). That concept includes environmental site design to the maximum extent practicable, which is mandated by the Stormwater Management Act of 2007. The approach to stormwater management includes landscape infiltration,

some dry wells, a grass well and then a few areas to treat runoff from impervious surfaces. Tr. 56-57.

The natural resource inventory/forest stand delineation was approved on May 16, 2011, and along with that a forest conservation exemption was also approved. The exemption covers an activity on a tract of land less than 1.5 acres that does not consist of any existing forest specimen trees or champion trees. There are no forest conservation obligations on the site.

According to Mr. La Vay, the landscaping incorporates a variety of things. Proposed shade trees will provide shade in the paved areas, and ornamental and evergreen trees and shrubs are proposed to screen both the building and the parking from the surrounding areas. There also will be extensive landscaping for the landscape infiltration facilities, for stormwater management.

With regard to the potential fenced area for dog walking, the changes that occurred in the landscape plan were the addition of a chain-link fence, and the detail is shown on the second sheet of the amended plan.

Mr. La Vay further testified that the property is currently categorized as W1 and S1 for water and sewer service, although the public sewer does not extend north on Old Columbia Pike past Fairland Road. The project will require a public sewer extension of approximately 500 feet to provide sewer service. The existing house has a septic system which will be abandoned. That particular public sewer extension has received WSSC Phase I conceptual approval. There is an existing 12-inch water main in Old Columbia Pike that provides a small diameter house connection to the existing house. That will be abandoned and replaced with an upgraded water service for both the house and the new structure.

Petitioner proposes an up-lighted entry sign just north of the drive aisle that connects to public right of way. It would set back the five feet as required in Section 59-F of the zoning

ordinance. The dimensions of the sign are approximately eight feet in length, seven feet in height, and two feet in depth. It will require a variance from the sign review board since it will exceed the maximum two square foot requirement for a sign in a residential zone. [The Hearing Examiner raised a question as to whether a sign variance is required when the sign will be at the entrance to a new subdivision. Tr. 62-65.]

Mr. La Vay noted that the spots on the photometric analysis showing over the 0.1 foot candle limit will be corrected by adjusting the location of two fixtures that caused the overages to make sure this complies with the requirement. A modified photometric analysis will be submitted.

Mr. La Vay opined that the proposed development will meet all the development standards for the zone and for the special exception use. He described the surrounding land owned by the State Highway Administration (SHA). To the north, the vast majority of that area is consumed and being consumed by the ICC construction. Just to the south of those interchanges, there are wetland areas, a state highway storm drain outfall, and a stream valley buffer that's shown on Exhibit 6(a), very close to the northern property line. The vast majority of the areas to the north are consumed by either the ICC or environmentally sensitive areas that would not allow for development. To the east side of the property, the interchange at Route 29 consumes a lot of that area, as shown on Exhibit 31. The area to the south is currently being used as staging activity for state highway. There's an abundance of manholes and containers and things on the property now. The SHA indicates that they plan to house a permanent stormwater facility and potentially a park and ride area for either bus rapid transit or car pooling purposes. In sum, it is very unlikely that there will be residential development to the north, east or south of this site. Tr. 66-69.

In Mr. La Vay's professional opinion from an engineering perspective, the proposed use would not be detrimental to the use or development of surrounding properties. The project meets all

of the required development standards for the R-90 zone and this particular use. Nothing from an engineering perspective would be adverse to the health, safety and welfare of the residents in the area, visitors to the area or employees in the area.

4. Eric Doering (Tr. 71-89):

Eric Doering testified that he is as Development Consultant, specializing in the veterinary industry. He advises clients through design, construction, occupancy and warranty for a building. He uses a three phase approach to any project. It starts with preliminary planning, which is really a feasibility study, which determines if a property is going to be suitable based on the programming requirements. Then he puts the numbers together in a budgeting package, including demographic studies and financing. Once there is preliminary approval on financing, the special exception is sought.

Mr. Doering used elevations of the proposed building to show that Petitioner tried to maintain a "country type feel" by minimizing the size of the building and its profile from the road. Tr. 78. It was positioned behind the residence in addition to setbacks pushing in that direction. So the residence to some extent actually screens the look of the building.

The proposed south elevation has a separate entrance and exit which doesn't allow for the animals to be confronted with another aggressive animal. The building's overall height to the top of the peak is just under 24 feet. It's 23 feet, 10 inches from the finished floor. The mid point in the roof is at 18 feet.

After entering, clients walk into a reception area and behind that there will be four client exam rooms. That's the front half of the building. The back side is going to be the clinical side where treatments are going to be done, surgery, x-ray, those types of things. And then the back corner is going to be animal holding.

Based on his experience, Mr. Doering feels that this building will be in harmony with the general character of the surrounding area. [The Hearing Examiner noted that he would let Mr. Doering answer the question from the standpoint of a lay person, since he was not offered as an expert. The same caveat was applied to his answer to the next question about noise.] Mr. Doering stated that if the building is constructed in accordance with Mr. Wysenavich's recommendations, it will be able to satisfy the county's noise ordinance standards. He noted that there would be boarding only for medical purposes, which will be a light volume.

[Mr. Kline promised a report from a noise expert. Tr. 88.]

5. Charles Bailey (Tr. 89-103):

Charles Bailey testified as an expert in land planning. He noted that the Master Plan does not address this particular property, but rather focused on the surrounding parcel that has been the topic of some discussion that the State now owns. The Plan recommended cluster development for the surrounding area to the north, east and south, if it developed residentially. Mr. Bailey interpreted that the planners understood that there were impacts from the nearby roads associated with the surrounding piece of property. He feels that it is unlikely that the northern and eastern land will be developed residentially, and that it would not make sense to develop the southern property residentially. Tr. 95-97.

Mr. Bailey noted that the neighborhood definition provided by Technical Staff makes sense. He is aware of the special exception that was associated with the gas station on the corner of Fairland and Old Columbia Pike but, there's nothing that would suggest that it would increase the likelihood of others in the future; nor does he see any non-inherent characteristics of the use. Tr. 98.

In Mr. Bailey's opinion, nothing about the use strikes him as incompatible with the surrounding area. The fact that the existing home will remain and serve as the frontage onto

Fairland, and that this is being developed as a barn structure behind is particularly appropriate. Given the character of the homes across the street, it fits in with that as well. In his professional opinion, the use and the design would be in harmony with the general character of the neighborhood.

If there is an outdoor exercise area, it should be on the northeast corner of the building because that's the area that's less likely to be subject to redevelopment. He estimated that the closest portion of the proposed run to the southern property line would be about 128 feet.

Mr. Bailey also opined that the proposed sign would be compatible, and even on the small side. He also feels that illuminating it from the ground versus being internally illuminated would give it a nicer character. Tr. 103.

6. Craig Hedberg (Tr. 103-113):

Craig Hedberg testified as an expert in transportation planning and traffic engineering. He prepared a transportation statement (Exhibit 17(a)), which projected a maximum of 18 peak hour trips for the site (in the PM peak hour). Because that is under 29 peak hour trips, Petitioner did not have to do a local area transportation review or analyze external intersections. The transportation statement meets the requirements for the traffic associated with the special exception application.

The policy area mobility review requirement must also be satisfied, and in the Fairland policy area, the requirement is that 45 percent of the trips generated are subject to a PAMR mitigation requirement. The end result is that approximately eight trips must be mitigated, with a payment of about \$93,800.

In Mr. Hedberg's professional opinion, the transportation networks surrounding the subject property would be adequate to accommodate the traffic that would be generated by the proposed use. Also, the circulation on the site and the access to the site will be safe, adequate and efficient for the proposed use.

Referring to the environmental impact study for the ICC (Exhibit 38), Mr. Hedberg noted that noise walls will have to be constructed on the east side of U.S. 29 to dampen the traffic noise in the area. Looking at the location of the subject property, the ramp configurations in terms of the potential proximity to housing units, Mr. Hedberg concluded that if housing were proposed around the subject site, there would have to be some sort of a noise analysis, with a rather strong potential that there would have to be some remedial action taken in order to develop the site as residential.

Mr. Hedberg further opined that this site would not diminish safety for vehicular or pedestrian traffic the way it is designed, and the roadway system is adequate for this project.

B. Community Testimony

Marylee Davids, Trustee of Blaney B. Marlow Trust (Tr. 17-22, 49-50):

Marylee Marlow Davids testified that she live at 12914 Marlow Farm Terrace in Silver Spring. Mr. Kline identified her as the Trustee of Blaney B. Marlow Trust, owner of the subject site. She reviewed the history of the site, which is part of a larger property that was sold piecemeal over the years. The only thing that's left now is the subject site. She feels that the proposed veterinary hospital "would be a great way to kind of end our community involvement by having something like this that will benefit everyone." Tr. 17-19.

According to Ms. Davids, the state doesn't know what it is going to do with the area surrounding the site that is not in the roadway right now. "They're talking about light industry. At one point they're talking about clover leaf to go over Route 29 and actually closing off Fairland Road. But right now, they didn't use as much as [they] thought they were going to use for the ICC. . ." Tr. 19-21. She noted that there has been talk about light industry to put in there, but not about residential development. The accessory apartment on the premises has not been used for years and could be removed. Tr. 21-22.

The Hearing Examiner asked Ms. Davids whether she objected to materials from an acoustical expert being filed after the hearing, without her having the opportunity to cross-examine the witness. Ms. Davids replied that she had “no problem with it,” and she was sorry Petitioner had to do acoustical study (Tr. 49-50):

If you stood in the backyard we know you can't hear anything because of all of the traffic. And the reason you don't have community people here today is because, you know, most of the time people only show up if they've got a complaint. And the people in the community know what's going on, and they're in favor of this. This is why there's no one here to, I guess, support them is because they're in favor of it. . . .It's just, as you can see it on the map, it's just road, road, road, and I don't know how you would hear anything whether you have hearing aids in or not.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if it complies with the recommended conditions (Exhibit 20).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a veterinary hospital use. Characteristics of the proposed use that are consistent with the “necessarily associated” characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the “necessarily associated” characteristics of veterinary hospitals, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff suggested the following inherent characteristics of a veterinary hospital use (Exhibit 20, p. 5):

- (1) vehicular trips to and from the site;
- (2) noise and odor of animals;

- (3) deliveries of mail and small parcels;
- (4) specialty medical equipment needing servicing, mostly by technicians in regular vehicles; and
- (5) drop-off and pick-up of pets in parking areas.

The Hearing Examiner accepts that listing as a fair description of the inherent adverse impacts of a veterinary hospital, but would add a more direct reference to the traffic, parking and lighting routinely created by such a use. Noise could also be an inherent effect, but acoustical conditions of the special exception circumscribe any such noise characteristics.

Technical Staff found (Exhibit 20, p. 6):

. . . Staff finds that the size, scale, and scope of the proposed use is minimal and is not likely to result in any unacceptable noise, traffic, or environmental impacts. There are no non-inherent adverse effects associated with this use that are sufficient to deny this Special Exception.

Charles Bailey, Petitioner's land planner, testified that he also does not see any non-inherent characteristics of the use. Tr. 98.

The Hearing Examiner agrees with Staff that no non-inherent adverse effects are likely to result from the activities associated with the application. The subject property is surrounded on three sides (north, east and south) by state land, mostly occupied with roads, on-ramps and a staging area for state highway activities. It is thus very unlikely that there will be residential development to the north, east or south of this site. Tr. 66-69. To the west of the site, there is residential development, but it is separated from the site by Old Columbia Pike, and the nearest residential lot is about 390 feet from the proposed facility, which itself is screened on the west by the existing single-family residence that will remain.⁵ Under these circumstances, the Hearing Examiner concludes that there will be no non-inherent adverse effects, and certainly nothing warranting denial of the petition.

⁵ The 390-foot figure is based on the Hearing Examiner's measurement using the Site Plan (Exhibit 4(a)). This figure differs from the setbacks listed in the site plan's table and in the Technical Staff report (Exhibit 20, p. 9) because those figures relate to setbacks of the remaining single-family home from the street, whereas the Hearing Examiner is here considering the distance from the proposed facility where animals will be kept to the nearest residential lot to the west.

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: A veterinary hospital is a permitted special exception in the R-90 Zone, pursuant to Zoning Ordinance §59-C-1.31(d).

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: As discussed in Part IV. C., below, the proposed use would comply with the standards and requirements set forth for the use in Code §59-G-2.32.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: As noted in Part II. D. of this report, the subject property lies within the area covered by the 1997 Fairland Master Plan. As spelled out in the referenced section of this

report, the Hearing Examiner agrees with the Technical Staff's conclusion that the application is in conformance with the Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: As stated by Technical Staff (Exhibit 20 p. 7):

Although the veterinary hospital would be a new use for the area, the use will be in harmony with the general character of the surrounding neighborhood. The adjoining properties north, south and east of the subject property are owned by the State which acquired the land for highway right-of-way purposes. The new building will be setback approximately 220 feet from the street and approximately 65 feet from the rear of the existing dwelling. Adequate parking is proposed. Traffic conditions will not be affected adversely. Staff finds that the operation of a veterinary hospital would not have an adverse impact on the neighborhood.

The Hearing Examiner agrees, noting that the exiting single-family residence will remain and will screen the proposed new facility. That new facility will be designed to look like a barn for the retained single-family residence, and its design, scale and bulk will be in harmony with the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the requested use would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site. All animals will be treated within the interior of the new building.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that Petitioner will comply with this section (Exhibit 20, p. 7):

Staff finds that the proposed use will not create any noise inconsistent with noise levels that now exist in the area. According to the acoustical study submitted by the applicant, the exterior walls will be constructed in a manner that would place the sound levels well within the requirements of the Zoning Ordinance. There will be no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site.

There is no contrary evidence, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: There is a special exception on the site for an accessory apartment, but the owner of the land, Marylee Davids, testified that that has not been used for years and may be discontinued. Tr. 21-22. The only other special exception in the neighborhood mentioned by Staff is a gasoline station located at the northwest intersection of Old Columbia Pike and Fairland Road. Exhibit 20, p. 3. The Hearing Examiner agrees with Technical Staff's conclusion that "...the special exception will not increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely." Exhibit 20, pp. 7-8.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. The establishment of a veterinary hospital at this location will provide needed health care for local pets, and will have no adverse effect on any of the listed individuals.

(9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

(A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

(B) *If the special exception:*

- (i) does not require approval of a new preliminary plan of subdivision; and*
- (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*

then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

Conclusion: Technical Staff indicates that the subject property must proceed through the subdivision process for platting purposes. Since the proposed use will require subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9)(A), approval of this special exception must be conditioned upon approval of a preliminary plan of subdivision by the Planning Board. Such a condition is recommended in Part V of this

report. It also provides that, if changes to the site plan or other plans filed in this case are required at subdivision, Petitioner must file a copy of the revised site and related plans with the Board of Appeals. The issues of adequacy of public facilities will be addressed at subdivision. Nevertheless, Petitioner produced testimony by Craig Hedberg, an expert in transportation planning and traffic engineering, to the effect that both LATR and PAMR would be satisfied, as discussed in Part II. C. 6. of this report. Tr. 103-113. Technical Staff confirmed Mr. Hedberg's findings, stating "Staff has not recommended any transportation-related conditions to support granting of the subject Special Exception, since the application meets the transportation-related requirements of the APF test. The proposed use will not have an adverse effect on the transportation network within the immediate local area." Exhibit 20, p. 4.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Mr. Hedberg further opined that this site would not diminish safety for vehicular or pedestrian traffic the way it is designed, and the roadway system is adequate for this project. Tr. 112-113. Technical Staff agreed. Exhibit 20, p. 8. Based on this record, the Hearing Examiner finds that the use will not reduce the safety of vehicular or pedestrian traffic.

C. Specific Standards: Veterinary Hospitals.

The specific standards for a veterinary hospital are found in Zoning Ordinance § 59-G-2.32. The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the proposed use would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.32. Veterinary hospital.

(a) In any commercial, central business district or transit station zone where permitted by special exception, a veterinary hospital must comply with the following conditions and requirements:

- (1) There must be no runs, exercise yards, or other facilities for the keeping of animals in any exterior space.*
- (2) All areas for the keeping of animals must be soundproofed.*

Conclusion: Not applicable; the property is not in a commercial, CBD or transit station zone.

(b) In any residential or rural zone where permitted by special exception, a veterinary hospital must comply with the following conditions and requirements:

- (1) In the R-150, R-90, and R-60 zone, the ~~maximum~~⁶ [minimum] lot size is one-half acre. In the R-60 zone a veterinary hospital must be located along a major highway with an existing right-of-way width of no less than 90 feet, and be adjacent to or confronting a central business district or a property zoned for commercial use.*

Conclusion: The subject property contains 1.42 acres of land, which more than meets the one-half acre minimum lot size for this R-90 zoned parcel.

- (2) Exterior areas used to exercise, walk, or keep animals must be set back from any property line 200 feet and screened from adjacent residential properties. All exterior exercise areas and runs must be fenced for the safe confinement of animals.*

Conclusion: As discussed extensively in Part II. C. 3. of this report, the Hearing Examiner does not recommend approval of the exterior dog walk proposed by Petitioner in alternative plans (Exhibits 30(c)(1) and (2)) because it would not meet the statutory setbacks required in this section. Under the original plans (Exhibits 4(a), 5(c) –(e)), which the Hearing Examiner recommends be approved, there is no exterior dog walk.

⁶ The word “minimum” in the enacted bill was incorrectly codified as “maximum” in this section of the Zoning Ordinance. See footnote 1 on page 2 of this report for a further explanation.

- (3) For all buildings in which animals will be present, maximum expected interior sound levels must be reduced to 40 dBA (A-weighted decibels) outside, measured at ten feet from the structure.*

Conclusion: Noise issues are discussed in Part II. E. 3. of this report. According to Petitioner's acoustical expert, Richard J. Peppin, the sound levels outside of Petitioner's facility will be fully compliant with Zoning Ordinance §59-G-2.32(b). *See* Exhibit 42(a). Technical Staff also concluded that the proposed facility would comply with applicable noise standards. Staff noted that "The animals will be kept inside and will not generate unacceptable noise." Exhibit 20, p. 6. Staff concluded (Exhibit 20, p. 7):

Staff finds that the proposed use will not create any noise inconsistent with noise levels that now exist in the area. According to the acoustical study submitted by the applicant, the exterior walls will be constructed in a manner that would place the sound levels well within the requirements of the Zoning Ordinance. There will be no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site.

Based on this record, the Hearing Examiner finds that the proposed use will not create noise in excess of the prescribed statutory limits.

- (4) All buildings and accessory structures must be set back from any property line a minimum of 50 feet.*

Conclusion: All existing buildings and accessory structures are setback from the property lines a minimum of 50 feet, satisfying this provision. Exhibit 20, pp. 9 and 12.

- (5) No animal may be outdoors between 6 p.m. and 8 a.m.*

Conclusion: The Hearing Examiner recommends, in accordance with the Zoning Ordinance, that all animal activities relating to this petition be conducted indoors; therefore, Petitioner will comply with this standard. *See* Part II. C. 3. of this report.

- (6) *On weekdays, the sound at the nearest receiving property line must not exceed 60 dBA between the hours of 8 a.m. to 6 p.m. and 50 dBA between the hours of 6 p.m. to 8 a.m. On Saturdays, Sundays, and federal holidays, the sound at the nearest receiving property line must not exceed 60 dBA between the hours of 9 a.m. to 6 p.m. and 50 dBA between 6 p.m. and 9 a.m. Terms are defined in accordance with the Montgomery County Noise Ordinance (Chapter 31B of the Montgomery County Code). In any event, the predicted maximum receiving property line sound levels must not exceed the characteristic ambient sound levels by more than 3 dBA at any time.*

Conclusion: As mentioned in Part II. E. 3. of this report, the issue of potential noise from the veterinary hospital was studied by an acoustical engineer who concluded that the proposed use will not create noise in excess of the prescribed statutory limits. Exhibit 42(a). Technical Staff agreed, and the Hearing Examiner accepts these un rebutted findings.

- (7) *Dogs must not be walked or exercised in outdoor areas that are off-site.*

Conclusion: The Hearing Examiner recommends a condition to this effect, as proposed by Technical Staff.

- (8) *In addition to the submittal requirements in Sec. 59-A-4.22, the applicant must submit the following information. Applications submitted without this information are incomplete and will not be accepted or assigned a case number:*

- (i) *Acoustical engineering studies that demonstrate that the proposed use meets the standards in Sec. 59-G-2.02(b)(3) and (6) above. The studies must show the worst scenario sound level. The statement of operations must be sufficiently detailed to allow determination of how often the worst scenario sound level occurs.*
- (ii) *Detailed floor plans that show all the interior areas and their use designations,*
- (iii) *Site plans that show the layout of all exterior areas used to exercise, walk, or keep animals.*

Conclusion: As mentioned, an acoustical engineering report finding statutory compliance was filed as Exhibit 42(a); detailed floor plans were submitted as Exhibit 8(b), and a site plan was submitted as Exhibit 4(a). Under that site plan, no outdoor areas are to be used to exercise, walk or keep animals, and the site plan provided therefore shows no area to be designated for such an activity. As previously discussed, alternative plans showing an external dog walking area were also submitted, but the Hearing Examiner finds that they do not meet statutory setback restrictions.

(9) The Board must specify a minimum number of off-street parking spaces, taking into consideration the number of employees on the maximum shift, the number of doctors practicing simultaneously, and the number of appointments and deliveries. This number must in no case be less than 5.

Conclusion: Staffing will vary according to the demands for service. However, at the maximum period of utilization, this will include 3 veterinarians, 5 veterinarian technicians/veterinary assistants, and 2 receptionists/administrative aides for a total of 10 employees on site. The subject site provides 21 parking spaces, which Technical Staff finds “is ample given the size of operation and the maximum number of employees on-site.” Exhibit 20, p. 13. the Hearing Examiner agrees. One of the parking spaces will be an ADA van accessible space.

(10) The Board may regulate the number of animals that may be boarded, exercised, walked, or kept in runs or similar areas, and the manner in which animals are boarded, exercised, walked, or kept.

Conclusion: Petitioner is not requesting to board animals, except for overnight hospital stays when medically necessary; nor does the special exception, as recommended, include outdoor exercise or run areas. Therefore, this standard is not applicable.

- (11) *The Board may regulate the office hours and the number of appointments. Animals may be seen by appointment only. Emergency patients and visits to pick up prescriptions and pet-related items may also occur, within office hours only and without prior scheduling: abuse of this exemption may lead to revocation of the special exception. A written log of all appointments and drop-in and emergency client activities must be kept, to be available for inspection by County authorities.*

Conclusion: Technical Staff and the Planning Board support the office hours proposed by the Petitioner, as discussed in Part II. C. 5. of this report. A condition is recommended in Part V of this report requiring Petitioner to keep a written log of all appointments, as well as drop-in and emergency client activities. The log must be available for inspection by County authorities.

- (12) *Any accessory operation, such as grooming or the sale of pet food and supplies, must be set forth in the statement of operations and must be limited as an accessory activity to a percentage of sales not to exceed 20%.*

Conclusion: The veterinary clinic will not provided grooming services. The clinic will sell special pet food usually sold to pet owners in accordance with a prescription issued by the veterinarian. The volume of sales is a very low percentage of the clinic's gross revenue and sales are almost always made at the time of the treatment of a pet. Exhibit 20, p. 14.

- (13) *All litter and animal waste must be contained and controlled on the site.*

Conclusion: Technical Staff reports (Exhibit 20, p. 14):

Trash pick-up will be handled by Waste Management. Animal litter and waste will be collected on the site and will be handled by a special company named "Stericycle" who will regularly pick-up the litter and waste and will dispose it in accordance with OSMA regulations. In the case of a euthanized animal or a deceased animal, the animals are promptly tagged and wrapped in double heavy duty plastic bags that will be placed in a freezer within the clinic building. Valley Pet Cemetery and Crematory picks up dead animals every Wednesday where they are transported to Valley Pet's facilities for services requested by the pet owner.

- (14) *Animals may be kept overnight at the hospital only for medical purposes. If animals are kept for non-medical purposes, a separate application for an animal boarding place must be approved.*

Conclusion: No boarding is proposed; only holding of animals for medical recovery. A condition embodying these terms is proposed in Part V of this report.

- (15) *If the proposed use is located in an area that uses well water and septic facilities, the applicant must prove that the use will not have any negative effect.*

Conclusion: According to Technical Staff, this site will be served by public water and sanitary sewer, and therefore this requirement is not applicable. Exhibit 20, p. 15.

- (c) *Any veterinary hospital lawfully existing prior to the effective date of this ordinance is a conforming use, and may be extended, enlarged or modified by special exception subject to the provisions set forth in this section.*

Conclusion: Not applicable.

D. General Development Standards

In addition to the other general and specific standards set forth above, “*Special exceptions are subject [under Code § 59-G-1.23(a)] to the development standards of the applicable zone where the special exception is located [in this case, R-90] except when the standard is specified in Section G-1.23 or in Section G-2.*” For this special exception, minimum setbacks are specified in Section 59-G-2.32.

59-G-1.23. General development standards.

- (a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: This site is located in the R-90 zone. A comparison of the proposed special exception standards with the development standards of the R-90 Zone and of Section 59-G-2.32

is shown in the following Table from the Technical Staff report (Exhibit 20, p. 9). It demonstrates that the proposed special exception complies with all development standards:

Development Standards Table⁷

	Required	Proposed
Minimum lot area	21,780 sq. ft. (one-half acre)	62,191 sq. ft.(1.42 acres)
Maximum lot coverage (59-C-1.32)	30%	11%
Minimum Lot Width	75 feet	195 feet (approx.)
Maximum building height	35 feet	18 feet
Minimum setbacks (59-C-1-322)		
Front	50 feet	220 feet (approx.)
Side	50 feet	51 feet
Minimum rear setback	50 feet	51 feet

(b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As noted in Part II. C. 5 of this report, §59-G-2.32(b)(9)) requires no less than five parking spaces for a veterinary hospital special exception. Petitioner will provide 19 parking spaces for the hospital and two for the retained single-family residence, which Technical Staff considers “ample given the size of operation and the maximum number of employees on-site.” Exhibit 20, p. 13.

(c) ***Minimum frontage*** * * *

Conclusion: Not applicable to this special exception.

⁷ For the reasons set forth in Footnote 1 of this report, the Hearing Examiner has omitted the row of this table specifying “Maximum lot area” and moved the half-acre minimum lot area standard into the top row.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Not applicable. The use is exempt per Exhibit 6(b).

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable. A water quality plan is not required since the site is not in a Special Protection Area. Exhibit 20, p. 10.

- (f) **Signs.** *The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner proposes an up-lighted entry sign just north of the drive aisle that connects to public right of way. It would be set back five feet from the property line, and the dimensions of the sign itself would be 6 feet wide by 4 feet high. However, it would be mounted on stone base, which would make the overall dimensions approximately nine feet in length and seven feet in height. It is depicted on the Landscape Plan (Exhibit 5(e)), and on the Site Elevations (Exhibit 4(b)). Based on the evidence, the Hearing Examiner finds that the proposed sign would not adversely affect traffic and that it would be compatible with the area.

As discussed in Part II. C. 4 of this report, the sign may require a variance from the Sign Review Board since it will exceed the maximum two-square-foot requirement

for a sign in a residential zone. Tr. 62-65. However, since it will be at the entrance to a veterinary hospital, it may be considered by the Department of Permitting Services as a sign at the entrance to a “place of assembly,” which is defined in Zoning Ordinance §59-F-2 as “Any place of worship, school, library, museum, or hospital.” If it does so qualify, then larger dimensions and illumination are permitted under Zoning Ordinance §59-F-4.2(a)(3)(B). The following condition is recommended in Part V of this report:

A sign permit must be obtained for the proposed monument sign, and a copy of the permit for the approved sign must be submitted to the Board of Appeals before the sign is posted. If required by the Department of Permitting Services, Petitioner must obtain a sign variance for the proposed sign or amend the design of the proposed sign to have it conform with all applicable regulations. If the design is amended, a diagram showing the amended design must be filed with the Board.

- (g) ***Building compatibility in residential zones.*** Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: As stated by Technical Staff (Exhibit 20, p. 11):

The site in a residential zone and the proposed new building has been designed to be residential in appearance, scale, bulk, and height. Staff finds that the proposal is compatible with the character of the neighborhood. The proposed veterinary hospital will be constructed in the rear of the subject property, behind the existing residence, and will be designed to look like a barn related to the current residence.

Based on Staff’s evaluation and Petitioner’s evidence on this point discussed in Part II. C. 2. of this report, the Hearing Examiner finds that the proposed building will be compatible with the neighborhood.

- (h) ***Lighting in residential zones.*** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*
- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
 - (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: As discussed in Part II. C. 4. of this report, lighting proposed for the site is shown in a revised Lighting and Photometric Plan (Exhibit 44(a)). This Plan is a version that was modified as a result of the hearing because the original plans showed photometrics exceeding permitted limits in one corner of the site. The problem was resolved by slightly shifting some fixtures and adding shields (Exhibit 44(b)). The photometrics, as shown on the revised plan, are compliant with statutory restrictions limiting light at the side and rear lot lines to 0.1 footcandles. Zoning Ordinance §59-G-1.23(h). Technical Staff approved the lighting proposed for the site (Exhibit 20, p. 11), and based on this record, the Hearing Examiner finds that it will be compliant with the Zoning Ordinance.

59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Conclusion: As noted above, the Hearing Examiner finds that the proposed building will be compatible with the neighborhood.

Based on the testimony and evidence of record, I conclude that the special exception proposed by Petitioner meets the specific and general requirements for the use, and that the Petition should be granted, with the conditions recommended in the final section of this report.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2820, in which Fairland Animal Hospital, Inc. seeks a special exception for a veterinary hospital to be located at 13425 Old Columbia Pike, Silver Spring, Maryland, be **granted**, subject to the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and the representations of its counsel identified in this report.
2. The special exception is limited to a maximum of 10 employees, consisting of three veterinarians and seven support staff on-site at any one time.
3. Hours of operation are limited to Monday through Friday, 7:30 a.m. to 7:30 p.m., and Saturday, 8:00 a.m. to 5:00 p.m.
4. Per §59-G-2.32(b)(7) of the Zoning Ordinance, dogs must not be walked or exercised in outdoor areas that are off-site.
5. Per §59-G-2.32(b)(2), (10) and (14) of the Zoning Ordinance, no animals may be boarded (except for overnight medical purposes), nor may they be taken outside to be exercised, walked or kept in runs or similar areas on site.
6. Client visits must be scheduled by appointment only, except in emergencies. Per § 59-G-2.32(b)(11) of the Zoning Ordinance, Petitioner must keep a written log of all

appointments, drop-ins and emergency client activities, and make it available for inspection by the County.

7. Per §59-G-2.32(b)(12) of the Zoning Ordinance, accessory operations, such as the sale of pet food and supplies, must not exceed 20% of revenue.
8. Petitioner must maintain at least 21 parking spaces on site, unless the Board approves a change.
9. All litter and animal waste must be contained and controlled on the site.
10. Petitioner must comply with the requirements of the Amended Statement of Operations (Exhibit 18(a)).
11. A sign permit must be obtained for the proposed monument sign, and a copy of the permit for the approved sign must be submitted to the Board of Appeals before the sign is posted. If required by the Department of Permitting Services, Petitioner must obtain a sign variance for the proposed sign or amend the design of the proposed sign to have it conform with all applicable regulations. If the design is amended, a diagram showing the amended design must be filed with the Board.
12. Since the proposed use will require subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9)(A), approval of this special exception is conditioned upon approval of a preliminary plan of subdivision by the Planning Board. If changes to the site plan or other plans filed in this case are required at subdivision, Petitioner must file a copy of the revised site and related plans with the Board of Appeals.
13. Petitioner must make a payment to the County to satisfy the requirements of Policy Area Mobility Review (PAMR), in an amount to be determined at subdivision, but it is


currently calculated as \$93,600, to mitigate eight (8) peak-hour trips. The timing of the payment will be determined at subdivision.

14. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein.

Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: January 31, 2012

Respectfully submitted,



Martin L. Grossman
Hearing Examiner